UNITED STATES BANKRUPTCY COURT

SOUTHERN DISTRICT OF NEW YORK

Case No. 09-50026 (REG)

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In the Matter of:

MOTORS LIQUIDATION COMPANY, et al.,

f/k/a GENERAL MOTORS CORP., et al.,

Debtors.

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U.S. Bankruptcy Court

One Bowling Green

New York, New York

November 9, 2010

9:52 AM

B E F O R E:

HON. ROBERT E. GERBER

U.S. BANKRUPTCY JUDGE

HEARING re Debtors' Motion for an Order (I) Approving Notice of Disclosure Statement Hearing; (II) Approving Disclosure Statement; (III) Establishing a Record Date; (IV) Establishing Notice and Objection Procedures for Confirmation of the Plan; (V) Approving Solicitation Packages; and Procedures for Distribution Thereof; (VI) Approving the Forms of Ballots and Establishing Procedures for Voting on the Plan; and (VII) Approving the Form of Notices to Non-Voting Classes Under the Plan (the "Debtors' Disclosure Statement Motion") [Docket No. 6854]

HEARING re Debtors' Ninth Omnibus Motion Pursuant to 11 U.S.C. Section 365 to Reject Certain Executory Contracts and Unexpired Leases of Nonresidental Real Property ("Debtors' Rejection Motion") [Docket No. 4437]

HEARING re Debtors' Objection to Proof of Claim No. 67357 Filed by New United Motor Manufacturing, Inc. ("NUMMI") [Docket No. 5404]

HEARING re Supplemental Submission of General Motors, LLC in Support of Order Pursuant to 11 U.S.C. Section 105(a) Enforcing 363 Sale Order with Respect to Deutsch ("New GM's Supplemental Submission") [Docket No. 6834]

HEARING re Motion of General Motors, LLC (f/k/a General Motors Company) to Enforce the 363 Sale Order [Docket No. 7527]

HEARING re Debtors' 109th Omnibus Objection to Claims (Incorrectly Classified Claims) [Docket No. 7261]

HEARING re Debtors' (i) Objection to Proofs of Claim Nos. 1206, 7587, and 10162 and, in the Alternative, (ii) Motion to Estimate Proofs of Claim Nos. 1206, 7587, and 10162 [Docket No. 5845] ("Apartheid Objection")

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P R O C E E D I N G S

THE COURT: We're here on GM. Folks, I don't know what people were thinking when they put so many disputed matters on the calendar for a single day, all of which are going to require oral argument and where I would have thought, if I were you, I would want dictated decisions either at the conclusion of oral argument or after a relatively modest recess. With everything that was set up for today's schedule, not even counting the apartheid class action claims that are on for this afternoon, I'm going to be in a position to give you only one dictated decision today, aside from hearing what you have to say on status conferences of course, although possibly, because of some concerns that I'll articulate on the NUMMI controversy, when we get to it, I may come to the view that, instead of trying to provide any major substantive rulings on that, I'm going to dismiss the claim with leave to replead.

Mr. Karotkin, you and your guys are going to have to detail somebody going forward to ascertain how much can appropriately be handled on a single day. I am prepared substantively on all five of the matters that I got to deal with today, but you're not going to get rulings on five matters today. And while GM may be the largest case on my watch, it's not the only one, and we're going to have to do better.

The M-Tech matter is one where I'll be in a position to give you a dictated decision today, and therefore since it

will likely take a long time to dictate, and where I will not necessarily be in a position to do it without a break, I would recommend that we do it last. I would recommend that, if there are matters where you have many people for things that are short, we deal with them first.

I will take argument on the Deutsche matter but I'm not going to dictate a decision on that. And I would assume that I will get major argument on the NUVI (sic) matter. And of course I'm not going to dictate anything in M-Tech without hearing oral argument first, although of course the papers give me a pretty good indication of how I should rule on that.

I gather we have two status conferences: one on disclosure statement related matters, and one on the controversy between the UAW and New GM. I think it might be helpful to get those out of the way. And you can deal with your unopposed stuff any time you choose. What's your pleasure, Mr. Karotkin?

MR. KAROTKIN: Thank you, Your Honor. Stephen Karotkin, Weil, Gotshal & Manges, for the debtors.

We can -- I think we can handle the disclosure statement status conference relatively quickly. And with respect to the UAW matter, that's being handled by other counsel. I don't know how long they anticipate that will take. One of the problems we had today in trying to manage the calendar was, there were a number of different counsel

involved, and --

THE COURT: Yeah, but there's only one judge.

MR. KAROTKIN: Yes, that's for sure. -- and we were not able to get people to agree to adjourn things, and it was a little bit out of our control, and we apologize for that.

If you'd like, Your Honor, I can proceed with the status conference on the disclosure statement.

THE COURT: I think that would be helpful.

MR. KAROTKIN: Okay. As you know, we were here on October 21st at the hearing to consider approval of the disclosure statement. And at the end of that hearing, after you had ruled on a number of objections that had been raised, and ordered certain revisions to the disclosure statement as well as the inclusion of certain exhibits in the solicitation package that would go out in connection with voting on the plan, we went back and worked on finalizing the document. Unfortunately, Your Honor, it's taking a bit longer than we anticipated. For example, we just received on Friday, this past Friday, Your Honor, from the asbestos claimants' committee and the future claimants' representative, initial drafts of the asbestos trust agreement and the claims resolution procedures, which they had insisted be attached as exhibits to the disclosure statement. We have not yet had a chance to go through those documents. And we also received just yesterday from those same parties some proposed language that they want

included in the disclosure statement, reflecting their views on the debtors' asbestos liability, both with respect to present and future claims. And, again, we haven't reviewed that, nor has any other party had a chance to have a look at that.

The form of the -- what is called the GUC Trust Agreement has not yet been finalized, which is also to be an exhibit to the disclosure statement.

THE COURT: Which trust agreement is this, Mr. Karotkin?

MR. KAROTKIN: That's the General Unsecured Creditors' Trust, the agreement that governs how that trust will operate, Your Honor. From what we understand, the -- certain states, the U.S. Treasury and the unsecured creditors' committee have certain outstanding issues with respect to that document that still need to be resolved. And, additionally, there are certain, I would say, material open issues with respect to the projections to be attached to the disclosure statement, which in effect are the budgets going forward with respect to each of the trusts and how they will -- the amounts that will be funded under the plan by, in effect, the DIP loan with respect to the administration of those trusts. And there are ongoing discussions among the debtors, the unsecured creditors' committee and the United States Treasury with respect to those budgets and how those will be finalized, and that is a major issue that has not yet been resolved.

Based on where we are, Your Honor, I would suggest that we further adjourn this matter for approximately two weeks, of course subject to your schedule, hopefully during the week of November 22nd. And either by that time we will have hopefully, Your Honor, resolved these issues. And if they can't be resolved, we may need to come back to you to get some rulings with respect to certain matters.

THE COURT: Um-hum.

Mr. Mayer, Mr. Reinsel, either of you guys want to be heard on this?

MR. REINSEL: Tom Mayer for the creditors' committee. I think Mr. Karotkin capsulated it pretty well.

THE COURT: Okay.

Mr. Reinsel?

MR. REINSEL: We agree, Your Honor.

THE COURT: All right. Well, we're obviously not in a position to do anything today. The week of the 22nd is the Thanksgiving week, and we're talking about, tops, the 22nd and 23rd. I don't have Ms. Blum before me now, I can call her in, and I guess I will. I got to caution you that a lot of people are competing for relatively limited time, so we'll have to stand by on that.

Mr. Mayer?

MR. MAYER: It just occurred to me, Your Honor, you have the term loan litigation set down for summary judgment the

following week, I think?

THE COURT: I thought it was for the first or second week in December. I'd have to look at my calendar. Hang on a minute. I'll tell you that in a moment too.

(Pause; court and clerk confer)

MR. MAYER: I apologize, Your Honor, I thought that was going to be a helpful statement, but it probably isn't.

THE COURT: No, actually, it's fine, Mr. Mayer. I set the term loan summary judgment on Friday, December 3.

MR. MAYER: We have no problem with the 22nd or 23rd if Your Honor's calendar permits. If things start to slide, it may or may not be useful to have that date in mind as something to have a hearing after.

THE COURT: Well, fair enough. I could give you Monday the 22nd for disclosure statement issues, and I will do it now. If it slips, that's -- the next available day I would have -- because I assume if it slips on the 22nd it will have effectively slipped on the 23rd as well -- the week that begins the 29th. I might be able to give you the 29th, but I wonder if it's wise to keep your feet to the fire for the 22nd.

MR. KAROTKIN: My suggestion is we leave it at the 22nd and see what happens.

THE COURT: Okay.

MR. KAROTKIN: 9:45?

THE COURT: The 22nd, it'll be -- just keep in mind

that the longer you go without rescheduling, tables at the restaurant tend to get filled.

Okay, you got the 22nd.

MR. KAROTKIN: I'm sorry, Your Honor. 9:45?

THE COURT: Yes.

Okay. If there's anybody who was here just on disclosure statement, do we have anything else on that?

MR. KAROTKIN: We do not, sir.

THE COURT: All right, anybody who was here only for that is free to leave if he or she wants to.

MR. MAYER: Thank you, Your Honor.

THE COURT: I'd like to go to the UAW matter next.

(Pause)

THE COURT: I want to get appearances on this. Is it Ms. Buell?

MS. BUELL: Yes, it is.

THE COURT: Yeah, I haven't --

MS. BUELL: Good morning, Your Honor.

THE COURT: -- seen you in a while. How are you doing?

MS. BUELL: Very well.

THE COURT: Okay, thank you.

And for New GM?

MS. LENNOX: Good morning, Your Honor. Heather Lennox of Jones Day, on behalf of New GM.

THE COURT: All right, Ms. Lennox.

You folks can correct me if my memory is off, but my understanding was that you folks were going to agree upon a briefing schedule to deal with what we called the threshold issues. And then you were going to report back to me and, if the schedule were reasonable, I was going to approve it. And then I would decide that and then we'd see where we stand at that point in terms of our effect on Judge Cohn out in the Eastern District of Michigan. Am I leaving something out, or did -- don't be diplomatic; did I get it wrong?

MS. LENNOX: No, Your Honor. You stated it exactly correctly. And after Your Honor -- after the last status conference that the parties had on October 28th and your order that followed, the parties did confer and meet, and we have worked out a proposed discovery schedule and a briefing schedule with respect solely to the threshold issue that Your Honor articulated.

We filed yesterday afternoon the proposed form of stipulation and order. I have extra copies here if Your Honor would like to see them.

THE COURT: Yeah, it would be helpful if you could hand it up. I was doing other stuff yesterday --

MS. LENNOX: Understand, Your Honor.

THE COURT: -- and --

MS. LENNOX: May I approach?

THE COURT: Right, thank you.

(Pause)

THE COURT: Rather than making me read it --

MS. LENNOX: Yes.

THE COURT: -- while you're all waiting, Ms. Lennox, why don't you tell me what the deal points of it are?

MS. LENNOX: Certainly, Your Honor. Briefly, the parties did determine to engage in some very limited discovery. Those discovery requests are being served this week. In fact, we received the UAW's request last evening. Discovery responses are due between the parties the first couple days of December. Then the UAW will file an opening brief on December 22nd, New GM will file an opening brief on February 7th, and there will be replies two weeks following -- successive two weeks following. That would take us, Your Honor, to March 7th when briefing will be completed.

THE COURT: Okay. So the last reply would be Monday, March 7?

MS. LENNOX: Yes, Your Honor.

THE COURT: Uh-huh.

Ms. Buell, did she get it right?

MS. BUELL: Yes, Your Honor.

THE COURT: Okay. And then presumably you'd get an oral-argument date sometime after I'd had a chance to read the papers?

MS. LENNOX: Correct, Your Honor.

THE COURT: That's fine. And the stip is now before me for approval?

MS. LENNOX: Yes, Your Honor.

THE COURT: All right, unless I see something in it that you haven't described to me, it's going to be approved.

MS. LENNOX: Thank you, Your Honor.

THE COURT: And you can, for the time being at least, plan your lives accordingly.

MS. LENNOX: Thank you, Your Honor.

THE COURT: To what extent have you kept Judge Cohn in the loop on what's going on?

MS. LENNOX: Judge, the parties did go forward with the status conference in front of Judge Cohn on November 3rd. And on November 3rd Judge Cohn, based on your conversation with him, Your Honor, issued an order staying all proceedings in the Michigan case until Your Honor rules on the threshold issue.

THE COURT: Okay. Fair enough.

Do we have further business on this?

MS. LENNOX: No, Your Honor. May I approach Mr. Habbu with a disk?

THE COURT: I'm going to ask you to drop it off with my courtroom deputy Ms. Blum across the hall.

MS. LENNOX: I will do that, Your Honor.

THE COURT: Okay. Anything else, then, on UAW-New GM?

MS. LENNOX: No, Your Honor.

THE COURT: Okay, thanks.

You're excused, guys, if you want to be.

MS. LENNOX: Thank you.

THE COURT: All right.

MR. KAROTKIN: Your Honor?

THE COURT: Yes?

MR. KAROTKIN: If I may, with respect to item II on page 6 --

THE COURT: I got to find that agenda. Tell me what it is in conceptual terms.

MR. KAROTKIN: It's the 109th omnibus objection to claims.

THE COURT: Oh, yeah, that was in the unopposed category?

MR. KAROTKIN: Yes, sir. There were no responsive pleadings, and we have a proposed order.

THE COURT: That's fine. Drop it off with Ms. Blum across the hall.

MR. KAROTKIN: Thank you. And as to item number IV, Roman IV, on the same page --

THE COURT: Of page what? 6?

MR. KAROTKIN: Yes, sir.

THE COURT: The resolved matter with --

MR. KAROTKIN: Yes.

THE COURT: -- New York State?

MR. KAROTKIN: Yeah. New York State has withdrawn its proof of claim, so that motion is resolved as to all parties. And we can submit a proposed order to just finalize that.

THE COURT: That's fine.

MR. KAROTKIN: And I believe that takes care of the uncontested matters and the status conferences.

THE COURT: Okay. Then let's get on to the substantive arguments. On Deutsch, do I have counsel for Deutsch either in the courtroom or --

MR. KAROTKIN: Yes, Your Honor.

THE COURT: Okay. And who's going to be arguing? Is it Mr. Novack? I've forgotten.

MR. KAROTKIN: Yes, Your Honor.

THE COURT: Okay. Who's going to be arguing in opposition to Mr. Novack?

MR. KAROTKIN: I am, Your Honor.

THE COURT: All right, Mr. Karotkin. Here's where I want help from you folks. I've now read -- I've read the papers, including the supplemental papers. I think I know what the relevant language of the purchase and sale agreement is, and here's where I need help from each of you: Mr. Novack makes the point, which is a fairly obvious one, that when you're reading a contract, or for that matter an order, you try to give every word meaning and you don't want anything to be

surplusage. And he makes the point, in substance, and of course I'm paraphrasing, that "incident" must mean something different than "accident", because somebody in his or her wisdom used both words. So "incident" must mean something apart from "accident".

Mr. Karotkin, when it's your turn, I want you to tell me what you think "incident" means and what it's supposed to convey or cover if, as I'm inclined to rule, it doesn't by itself mean "accident".

Mr. Novack, when it's your turn, I need you to help me with a legal maxim that I remember from forty years ago back when I was in law school. I think -- I had long since forgotten the name of the maxim, but my recollection on it was refreshed and it was called "noscitur a sociis", and basically what it provides is that when you got words grouped in a list, they should be given related meaning.

So while my tentative California-style, subject to your guys being heard, would be that "incident" has to mean something different than "accident", my further tentative would be that "incident" has to be something roughly related or similar to "accident" under the principles of that maxim and that that maxim would be appropriate for use in this context, although of course each of you guys would argue your meaning as to what "related" means and how close or separate or the opposite of close that should be.

Another thing that I want both sides to address -- maybe you're better suited to do it, Mr. Karotkin, or you're the guy who would know -- is to what extent is there stuff in the record back from the time that helps me in a nonsubjective way get my arms around what you guys were trying to accomplish at that time. Back in June of 2009, and I remember this time pretty well because it was a period of about thirty days when I wasn't focusing on much else, I have a memory that there was a lot of discussion -- I don't remember whether it was from counsel, whether it was from Treasury, whether it was from the President of the United States, or some combination of that -- that people were concerned, at the time, about the trauma of the bankruptcy and its effect on GM's ability to sell cars. And I had the impression, fairly or unfairly, that GM put some provision in its documents so that New GM would cover some types of obligations, because you wanted to give the Joe Smith out there who'd be buying a car after the sale the comfort that, even if the car had been built before the sale, if he got hurt after the sale, after he bought the car, New GM wouldn't be saying 'That ain't my problem.' But I don't know the extent to which I have any of that in the form of admissible evidence or stuff as to which I can fairly take judicial notice, and the rules under the Federal Rules of Evidence for taking judicial notice don't leave much room for inference. It's got to be stuff that was -- and I'd have to go back to what Rules 201 and

202 say, but in substance I think they got to be either in the record and uncontroversial or widely known through the community. It can't be somebody's argumentative position about something. And of course if my memory is wrong as to what was going on at the time or what the motivation is, then either side should have the ability to be heard on that.

So, Mr. Karotkin, I think, technically speaking, this is your motion to enforce the earlier order and you should be heard first. And then I'm going to give Mr. Novack a chance to respond, you to reply, and for him to surreply, although in each case limited to what was said after the first round.

MR. KAROTKIN: Stephen Karotkin for General Motors Company.

Your Honor, looking at the language, and I think that our pleadings are very, very clear on this issue, the language of the applicable provision of the master sale and purchase agreement -- and there was some confusion about this at the last hearing, because I think that some people were focusing on the provision prior to its amendment. And as I'm sure you recall, Your Honor, the -- that provision was amended in its entirety in the first amendment, which was entered into prior to -- and I think this is important, prior to the time that the 363 sale transaction was approved. So --

THE COURT: In the week prior, as best I recall?

MR. KAROTKIN: It was June 30th. It was entered into

on June 30th. Your ruling was on July 5th, as I recall. And the order approving the 363 sale transaction has annexed to it the master sale and purchase agreement, as well as the amendment. So there is no mistake that, prior to the time you approved the transaction, that Section 2.3(a)(ix) is the operative provision.

And there was some confusion at the last hearing with words in the prior iteration dealing with discrete incident, and that's what Mr. Novack focused on, and I think that that was -- confused the parties as to the language and the operative language, which is absolutely clear. I mean --

THE COURT: It's those two words "accident" or "incident"?

MR. KAROTKIN: It's those two words, and it says that the only liabilities that are assumed by New GM are claims which arise directly out of death -- then it says personal injury or other injury -- caused by accidents or incidents first occurring on or after the closing date. It's impossible, Your Honor, with all due respect to Mr. Novack, to interpret that in the way that he is asking the Court to interpret it. There is no question, Your Honor, that the alleged accident or incident that caused the death -- and those are the operative words. What caused the death? If you read his pleadings, despite the fact that he was very clever and amended them after Your Honor signed the order, there is no question that this

death or the accident or incident which caused the death happened two years prior to the purchase agreement being approved by the Court. There is no question. There was an accident in June of 2007; that's in his -- that's in the original complaint.

Now, interestingly Mr. Novack, after Your Honor ruled and approved the sale and purchase agreement, cleverly amended the complaint to try to fit it within the language of this provision. And all of a sudden in the new complaint there is no reference to when the accident occurred. But of course no one can deny the fact, Your Honor, that the accident occurred in June 2007, June 27, 2007, and I think Mr. Novack would acknowledge that. And there is no question that the death arose from that accident. Nothing else happened. Ms. Deutsch was hurt, there was a car accident, it happened two years prior to the closing of the transaction, and that caused her death. And as far as we are concerned, that's the end of the analysis. It's very simple. There is no way that these provisions can be read any other way.

Now -- and Your Honor asked the question at the opening what is the difference between accident or incident? First I would say it's irrelevant. It's really irrelevant to the discussion, because, again, there is no question that this accident occurred two years prior, and it is that accident which gave rise to the death. And the claim arises from the

death, and that accident occurred two years prior to the filing; end of discussion.

Now, what's the difference between an accident or an incident, if it were relevant with respect to product liability claims? And I think there's an easy answer. You could have a car accident. Or you could have a car catching on fire; that's not necessarily an accident; that's an incident. Or a car could blow up with someone in the car. Or something else could happen; some other malfunction could cause a fire or injury to someone, not an accident with another vehicle necessarily; or an accident where you ran off the road. So I think that's easily explained.

But I really am abso -- I really don't know how there is any other logical interpretation to the words. The words are not ambiguous. The words are very clear. There is no allegation here, Your Honor, that Ms. Deutsch's death was caused by either an accident or incident first occurring on or after the 363 closing date. As they state in their pleadings, her death was caused by either an accident, and I think he will acknowledge it was an accident, or an incident that occurred on June 27, 2007. And there is no dispute as to that. And under those facts, the language is absolutely clear. You cannot reach any other conclusion.

And I know Mr. Novack thinks it's unfair, I know Mr. Novack thinks that his client ought to have a claim here, but

that's what the agreement says, and it doesn't give him or his client license to try to bootstrap their claim by manipulating the language or trying to change their complaint over other claims of people similarly situated. And as far as we are concerned, no other interpretation of the contract makes any possible sense.

THE COURT: Okay, thank you.

Mr. Novack?

MR. NOVACK: Good morning, Your Honor. Barry Novack, N-O-V-A-C-K, on behalf of Sanford Deutsch as personal representative of the estate.

We were here over five months ago, Your Honor, and at that time the Court requested that the parties explain two things: number one, what does the term "incident" mean and, number two, why were the words "distinct and discrete events" removed from the agreement. General Motors' documentation is totally silent on those two issues that the Court asked General Motors to address when we were here over five months ago.

Our position concerning the language is quite clear: There is a relationship between accident and incident, but it doesn't mean the same thing. The fact that both words were used in the agreement means, as Your Honor pointed out when we were here last time, both words have to be given meaning within the context of the agreement. Our interpretation of General Motors' language gives that meaning.

While the car crash, the accident itself, occurred back in 2007, our incident, the basis upon which our claim is being made, occurred after New GM was created. And our incident, meaning the events giving rise to our cause of action, are the complications that Ms. Deutsche had leading to her death.

And so we have a situation where, although the accident originally occurred in 2007, the incident which gives rise to General Motors' liability for that accident took place after New GM was created. And using that interpretation gives plain meaning to the words that General Motors put into the agreement.

THE COURT: Well, it gives meaning. I'm not as sure that it gives it plain meaning.

MR. NOVACK: Well --

THE COURT: It's a plausible explanation, but do you contend that it's the only one?

MR. NOVACK: Well, if there are multiple interpretations of that word, each one of which may apply, then there are multiple bases upon which their liability has been assumed. There is no one definition of "incident". They left out a definition of "incident". They opened it up to multiple interpretation. It's their contract.

And so if somebody else comes up with a different argument as to what "incident" may mean which falls within the

context of the agreement, they may as well likewise find liability on behalf of New GM. And so the language "or incidents" made it broader. Had they merely used the word "accident first occurring afterwards", I would agree: Our accident occurred before, we wouldn't be standing here. But they, for whatever reason, added words "or incidents". Maybe they wanted to include more claims; we don't know. But just looking at the language and looking at the interpretation that Deutsch is putting forth, the two of them comport with one another. And there's no basis using their agreement to exclude the Deutsch claim.

THE COURT: Okay, thank you.

Mr. Karotkin, reply?

MR. KAROTKIN: Your Honor, what Mr. Novack ignores is the language of the provision. The language says very clearly the death must be caused by an accident or incident that occurred post-closing, in order to be an assumed liability. It must be caused by it. He ignores that language. Ms. Deutsch's death was not caused by the incident that was her death. What he's saying is the -- her death was the incident which caused her death. It doesn't make any sense. You can't ignore the first few words of the relevant portion of the provision.

And as I said, it's very, very simple. That section says the claim, the claim, must arise directly out of death caused by an accident or incident first occurring after the

closing. Her death was not caused by her death, which occurred post-closing. That's what he's asking you to say. It's absurd.

THE COURT: Thank you.

MR. KAROTKIN: I have nothing further.

THE COURT: Mr. Novack, surreply?

MR. NOVACK: Your Honor, we are not saying her death was caused by her death. We are saying her death was caused by an event, an incident, which were medical complications. It led to her death, but we're not saying death is death.

THE COURT: Okay. Gentlemen, I'm taking this one under submission. Thank you.

MR. NOVACK: Thank you, Your Honor.

THE COURT: Just give me a moment before anybody comes up on anything else.

(Pause)

THE COURT: Okay, NUMMI. I want to get appearances and then I want everybody to sit down. I have preliminary comments.

MR. ALBANESE: Good morning, Your Honor. Anthony Albanese from Weil Gotshal. I'll be arguing the NUMMI matter.

THE COURT: Okay, Mr. Albanese.

MR. MCKANE: Good morning, Your Honor. Mark McKane and Ray Schrock, Kirkland & Ellis, on behalf of NUMMI.

MR. SCHROCK: Good morning, Your Honor.

THE COURT: Your colleague, Mr. McKane?

MR. MCKANE: Mr. Schrock.

THE COURT: Schrock? Okay.

MR. SOBLE: Good morning, Your Honor. Jeff Soble of Foley & Lardner, on behalf of Toyota Motor Corporation.

THE COURT: Forgive me. I saw the name on the pleadings but I didn't get it now.

MR. SOBLE: I'm sorry. It's Jeff Soble, S-O --

THE COURT: Soble. Okay.

MR. SOBLE: -- B-L-E.

THE COURT: Gentlemen, make your presentations as you see fit, but I have some fundamental, almost systemic, problems in getting my arms around this controversy. NUMMI is trying to get a 450 million dollar claim in this case, an environment where, for all practical purposes, I have a plenary litigation which is presently in the mode of a 9014 contested matter. This controversy walks, talks and quacks like a plenary lawsuit, and I think it's appropriate, if not essential, for me to manage it the same way.

What that means from the perspective of a judge who cares about procedure and fairness is that under Rule 9014 I need to invoke the power that 9014 gives me to make civil rules, "civil rules" of course being the jargon that we use for the Federal Rules of Civil Procedure in contrast to the Federal Rule of Bankruptcy Procedure applicable, in particular Rules

12, which is, as a practical matter, the context in which Old GM wants me to deal with the NUMMI claim, and also Rule 8, because, as I was trying to get my arms around this controversy, I thought of this in the terms that I used to think of things for the first twenty or so years of my career when I was a general-purpose litigator before I became a bankruptcy litigator. And I have the power to make Rules 8 and 12 applicable to this contested matter, but I think that before I do it I need to give you guys notice and opportunity to be heard. If you're prepared to waive any further notice and opportunity to be heard, we can do it from the get-go, but that's a matter of concern to me.

And let me tell you where I'm headed, because I'm troubled by certain aspects of what I read. I tried to get my arms around this stuff as best I could given the time constraints that I have with the other matters that I all had on for today. I was always brought up, long before Twombly and Iqbal were decided, to believe that, when you bring a contract action, you allege the contractual provisions that you say were violated, that, and maybe I was a traditionalist, you would attach as an exhibit to the complaint the full contract and then, in a paragraph of the complaint, you would say the contract in paragraph yada-yada provided this and the defendant breached that provision by doing that. Trying to get my arms around this controversy, recognizing as I do that over the

years the proof of claim has allowed claims to be filed without a great deal of attention, to pleading niceties, that's a problem when you're trying to get 450 million bucks out of somebody. And try as I might, when I read the NUMMI claim, I had trouble understanding what contractual provisions NUMMI was saying were violated.

Now, obviously I understand good faith and fair dealing and the contention that that implied covenant was violated. And implied covenants, by definition, don't appear expressly in contracts. But there were other claims as well, and I need help from the NUMMI side on that. I also need help from the NUMMI side on how a fifty percent shareholder can be liable to its -- to the company of which that fifty percent shareholder is a shareholder, for breach of fiduciary duty, at least in a situation when you're talking about the GM side of that ownership structure, where the other shareholder, Toyota, had both fifty percent of the stock and the ability, by reason of contractual provisions, to select an additional director.

We have a number of options here. I think that there is a very substantial likelihood that I am going to neither dismiss this claim in its entirety nor disregard what I see as pleading deficiencies. Where I tend to be headed, call it a tentative California-style, is to dismiss the most obviously deficient claim, which is the breach-of-fiduciary-duty claim, and to make Rules 8 and 12 applicable, dismiss the remaining

claims with leave to replead, so I can better get my arms around the contractual violations and the promissory estoppel claim.

I don't see how I can evaluate this 450 million dollar claim consistent with the requirements of Twombly and Iqbal, and I guess you can try to argue to me that they don't apply in bankruptcy when you're trying to assert a bankruptcy claim, although I think that would be a Hail Mary. I think what I need is a more traditional complaint that helps me get my arms better around these things. I'm inclined at this point to give neither side a whole lot of satisfaction either in the sense of unequivocal dismissal, nor comfort that this is a complaint that the judge is comfortable can fly and be sufficient to get past a Rule 12 motion.

I think, accordingly, that I need to flip-flop the traditional order on what would otherwise be, you know, the order in which you would hear a motion to dismiss, with the motion and then the opposition and then the reply and then any surreply, because I want to know from NUMMI whether it wants to be heard on whether I should apply Rules 8 and 12 and whether it would -- assuming we have those, and assuming that I'm going to manage this like a traditional plenary litigation, whether it wants to just say right now that it's going to replead or whether it wants to double-down and argue as to whether I should have the power and exercise my power to do that or not.

Yeah, come on up, please.

MR. MCKANE: Thank you. Good morning, Your Honor. For the record, Marc McKane of Kirkland & Ellis, on behalf of NUMMI. And I just want to go straight to the issues that you raised, and I can be swift. We believe 8 and 12 should apply, and we've cited those, you know, Twombly and Iqbal, as part of our initial response. I think some context is appropriate. Our firm was brought in after the proof of claim; actually immediately before the objection was filed. And we did our own independent assessment and analysis of the claim. And in our initial response, we dropped the breach-of-fiduciary-duty claim. We moved forward on --

THE COURT: I'm sorry, should I have picked that up in the papers?

MR. MCKANE: No. No.

THE COURT: You don't need to be diplomatic.

MR. MCKANE: No, not at all. Not at all. I think we should have probably spelled it out even more that what we're trying to move forward on are four breach-of-contract theories and a promissory-estoppel theory. But as to should you be managing this as a plenary piece of litigation, I think the fact of the matter is the answer's yes. Since the objection was filed, the parties have tried to resolve the matter. I think fundamentally there's a gating item here as it relates to whether our contract claims are viable.

And so to the extent that the Court is asking us to evaluate whether we're willing to drop the breach-of-fiduciary-duty claim, we are. Whether we're willing to replead the contract claims, we are. And I think what may be best is -- I think what we'll hear from our adversaries at MLC is that, even with those contract claims, even if we replead them, they believe that, as a matter under 12(b)(6), we cannot state a claim under the contracts. And so it may be best to set a schedule now that we file a full-on complaint and we set a schedule for a 12(b)(6)-type hearing, because I think that's what we're going to hear from the other side.

THE COURT: Mr. Albanese, may I get your perspective, please?

MR. ALBANESE: I can come up to the podium. Your Honor, we're fine with this being treated as a plenary proceeding, as you outlined. If the Court wants to allow NUMMI to replead their claim, that's fine with us. We don't believe they'll be able to sufficiently plead a claim, but we can reserve our right and make those arguments at a later time.

Also, as far as the claims process, to the extent that they are bringing new claims, we don't think that should be allowed, because of the bar date. But to the extent they're going to replead their existing claims, that would be fine with us.

THE COURT: Well, to the extent they're new claims.

There's a lot of law on whether or not it relates back and whether they're sufficiently related, and the last thing, of course, any guy in my position would do is make a judgment on that now. It would seem to me, subject to your rights to be heard, for you -- that you guys should, consistent with what Mr. McKane said, set up a mutually satisfactory schedule for him to give you an amended pleading for you to answer, move or otherwise respond. You've been around the block a few times, so you know the vocabulary and the drill. And if you want to contend that it either doesn't pass muster under 12(b)(6) and similar doctrine, or that it reflects such new claims as they don't relate back to what was already in the proof of claim, you got the usual rights on that, and Mr. McKane has the usual rights to be heard in opposition.

MR. ALBANESE: We're happy to proceed in that fashion, Your Honor.

THE COURT: Okay. Then what I would be of a mind to do, although I haven't heard yet from Toyota -- frankly, I'm not exactly sure what Toyota's standing is in this controversy, but I'll give it a chance to be heard on it. And my tentative, subject to your ability, all three of you, to comment, is to direct you to come up with a stip or consent order that papers your procedural game plan for going forward.

I would like to have a classic complaint here. And I would like NUMMI to say in baby talk the contractual provisions

that it alleges were violated. And everybody's got reservations of rights up and down the road.

Mr. McKane?

MR. MCKANE: One other issue -- it's related -- is that, along with this consented and stipulated scheduling order, NUMMI does intend to file a motion, a 3018 motion, so we're able to vote the claim. And what we've asked is that, as part of that scheduling order, at the same time that we file the amended proof of claim or complaint, we will file that motion as well.

THE COURT: In other words, to estimate it for voting purposes?

MR. MCKANE: That's -- well, we -- that's correct. That's correct. We'd like to vote the claim.

THE COURT: Sure. Can you at least have a talk with Mr. Albanese, or perhaps more appropriately Mr. Smolinsky or Mr. Karotkin, to see if you can agree upon some number, so I have one less issue to have to adjudicate on a nonconsensual basis?

MR. MCKANE: Yes, Your Honor. We're going to do our best to reach a number just for voting purposes, and I understand there will be lots of reservations and qualifications that it would not be used for other purposes.

THE COURT: I guess I'm fine with it. I guess the question is, if you had a grand slam and you collect 450

million dollars, would it make a difference in the claims picture in this case?

MR. MCKANE: Well, we don't believe so, given the numbers that are at issue here. I mean, I -- you have to understand, NUMMI's in the midst of its own wind-down and has not yet filed Chapter 11; we're trying to do it out of court. So 450 million may not seem a lot here; to us, it's a lot of money.

THE COURT: Oh, sure, I understand that, but of course, if you win, aren't we talking about an unsecured claim?

MR. MCKANE: Yes. Yes, that's recognized. It's still an unsecured claim. So in a grand scheme of what the unsecured claims are here, no. It's more than a rounding error, but it's not --

THE COURT: All right, I'm not going to micromanage it and I'm not going to try to play chessmaster here. Certainly you have the right file a 3018 if you can't deal with it consensually, but I'd like you to try.

MR. MCKANE: Understood, Your Honor.

THE COURT: Okay.

Toyota want to be heard? Mr. Soble? I'll give you that opportunity now. I do have reservations about your 1109 standing, but go ahead.

MR. SOBLE: Your Honor, for the record, Jeff Soble from Foley & Lardner, for Toyota Motor Corp.

The contracts at issue, the VSA and the 2006 MOU, my clients also are party to. We have claims based on breaches of the same contracts, and your construction of the language in those contracts could very well be used against Toyota with respect to Toyota's claims. If it's favorable for MLC and, on the same token, if it's favorable for Toyota, we obviously would use that, but it's the same contract language being construed.

Prior to today, we were asked to attend settlement negotiations between MLC and NUMMI, as both MLC and NUMMI recognized that our claims were based on the same contracts, many of the same legal issues and many of the same facts. So with that in mind, Toyota did not want this issue to go forward without a chance to be heard, so that it would not have its legal positions decided in the case without it having a chance to speak for itself.

THE COURT: Well, fair enough, and that's not a bad answer to my question. So I guess, then, what I would ask is, would it be constructive for you to talk to the other two parties to see whether -- if your claims should be coordinated just like you have, you know, MDL type of coordinated discovery and sometimes pre-trial management, so that nobody's reinventing the wheel, putting aside the extent, if any, to which collateral estoppel or res judicata, or even stare decisis, might come back against you, and whether I should be

suggesting to you, or ordering, that you take your claims, put them in the form of a complaint and that they be dealt with in some kind of joint administration, kind of by analogy to how we deal with separate debtors without substantive consolidation?

MR. SOBLE: That's precisely what we think should happen, Your Honor; otherwise, if they're not, if the -- because there's no objection to our claims currently, we'll be back here at the same point, come what I presume will be a motion to dismiss on NUMMI's claims, filing a brief in support of our own position, because otherwise those issues will be decided. So we do think we should also file a complaint and that they should be -- you know, discovery should be done all together and the issues should be decided at the same time.

THE COURT: All right. Let me get Mr. Albanese's thoughts vis-a-vis this part.

MR. ALBANESE: Yeah, I mean, Your Honor, we'll confer with our client, but we think that's a reasonable suggestion that they file a complaint, so we'll be able to see what their claims are, laid out in detail in the complaint. And we're happy to coordinate the two proceedings, where sensible, and to avoid any overlap.

THE COURT: Okay.

Mr. McKane, I assume you're cool with that approach as well?

MR. MCKANE: Very much so.

THE COURT: Okay.

All right, gentlemen, then do you think that we now have a satisfactory basis for going forward? And is there anything that we've not dealt with today that is more appropriately dealt with today?

MR. ALBANESE: I don't think so, Your Honor. I think we have a good plan laid out now.

THE COURT: Okay, Mr. McKane?

MR. MCKANE: I'm satisfied as well. Thank you for your time.

THE COURT: Okay, Mr. Soble?

MR. SOBLE: Same here, Your Honor. Thank you.

THE COURT: Very well. Okay. Then you guys as well are excused. And let me take a look at my agenda. I think -- I'm wondering if I'm now up to M-Tech.

MR. KAROTKIN: I think that's right, Your Honor. That's the last matter on the calendar.

THE COURT: For the morning?

MR. KAROTKIN: For the morning.

(Pause)

THE COURT: Okay, folks, I'd like to get appearances, and then I have some preliminary comments and questions that I would like you folks to help me with when it's your time.

MS. KRAUS: Good morning, Your Honor. Kate Klaus from Maddin Hauser, on behalf of M-Tech.

THE COURT: Okay, Ms. Klaus.

MR. WEISS: Good morning, Your Honor. Robert Weiss, Honigman Miller Schwartz and Cohn, on behalf of General Motors LLC.

THE COURT: Right, Mr. Weiss.

MR. SMOLINSKY: Good morning, Your Honor. Joseph Smolinsky, Weil, Gotshal & Manges, on behalf of the debtors.

THE COURT: Okay.

Folks, I've read the papers, and make your arguments as you see fit, but I want you to deal with the following questions and concerns I have.

Ms. Klaus, as I understand the chronology or the events that took place back in 2009, at the time when the original assignment -- assume-and-assign issue came up, you or your client originally didn't get the password or username or whatever it took to get access to the Web site where you could see -- and by "you" I mean you all, Southern-style -- what Old GM was proposing to do. But some days or weeks later, something happened that caused you to amend your objection and you no longer were stating in what I'll call objection number 2 that you didn't have access to the Web site.

Can I infer from that that, by the time that happened, you or your client did have access to the Web site and you could see what the Web site said? And as I understand it, it said, insofar as your client was concerned, that a -- I think

the words that were used was blanket agreement was proposed to be assumed and assigned. And it was identified with a number which matched up to the number that Old GM had stuck on its so-called purchase order, but it never used the word "lease". Nevertheless, each of your first and your second objection talked about what it would take to cure on the lease. And you can help me by understanding what you thought the basis was for talking about cure under the lease back then when the proposed assume and assign didn't mention the word "lease".

Now, with that said, Mr. Weiss, when it's your turn I want help from you as to why, when you got an objection that, from your perspective, not necessarily mine, would have been off the wall, because you're ships passing in the night, why either by a pleading or submission or a phone call there wasn't a call to Ms. Klaus or -- and I'd have to go back to see whether she was the original signer of those two objections, and say 'Hey, we're not talking about the same thing.' Now, I don't know whether that's because you had something like 600 of these assume-and-assign objections at the time, or because it wasn't on your radar screen, or you missed the subtleties, which now at least are arguably relevant. But that is unclear to me.

I can read the documents and I can construe the documents, but there are certain documents where I don't know whether or not I should be construing them, and in particular

I'm thinking about the other one, the so-called schedule or schedules -- I've seen it referred to both ways -- where the lease is identified, and I'm paraphrasing, as a "reject later". If that had been communicated to Ms. Klaus where she can be charged with knowledge of that, that might potentially be relevant. But she makes the point in her reply or surreply, or whatever we're up to in the chain of documents, that it's hearsay. And whether or not it's hearsay depends on what you want to use that for. And in particular, when you say that was conveyed to M-Tech, if in fact you do contend that it was conveyed to M-Tech, if it was conveyed to M-Tech at some meaningful time, then you might be arguing that it's relevant for notice and that hearsay is irrelevant. On the other hand, if it is like some private confirmation that that's what you're always thinking of, it seems to me that if you're not contending that it was conveyed to M-Tech, then she may be right that you got hearsay issues, unless you're trying to argue solely that it's a prior consistent statement, which is admissible to the extent, but only the extent, that it's offered to rebut the inference of fabrication, as best I remember the rule, again, from forty years ago or -- I can't say it's forty. I actually used that rule from time to time over the thirty years I was a lawyer.

But I don't see anything in the record before me establishing when that scheduling showing the reject later was

conveyed to M-Tech or to Ms. Klaus. So I need help from you in that regard.

Ms. Klaus, with that said, I need help from you as to why the -- I shouldn't find, based upon the documents, putting aside all the arguments you guys are making, that the only agreement that was assumed and assigned was the one that was shown on the Web site as being assumed and assigned. And the law in this district in particular -- I think it's become pretty much the nationwide law, but certainly in this district -- is we don't find assumptions of contracts by implication. The guy up in the robe, or the woman in the robe, has to make that decision, because, especially in light of Second Circuit law, a case we call Klein Sleep, improvident assumptions can be disastrous for an estate. Now, of course when it's an assume coupled with an assign, it's not as disastrous, but we still maintain control. And if the separate lease wasn't assumed, then it would seem to me that it can still be rejected, unless you can bring some law or document to my attention that I'm not aware of from the homework I did in getting ready for today.

So with that said, I think here, because my concerns are directed at both of you folks, and there's no obvious order in which to hear them, I'll go -- first hear from you, Mr. Weiss, then Ms. Klaus, and then give you a chance to reply and give her a chance to surreply.

MR. WEISS: For the record, Robert Weiss on behalf of General Motors LLC.

Your Honor, my remarks will be very brief, but first let me address the Court's questions. First with regard to --

THE COURT: Mr. Weiss, can you pull that mic a little closer to you, please?

MR. WEISS: Sure. Your Honor, first with regard to the question of why General Motors LLC didn't contact the debtors -- excuse me, M-Tech, when we -- when their objection was filed, basically that was an inadvertence. Because of the number of objections, there was a database that was maintained, and that database, for whatever reason, did not include that objection. So there wasn't a conscious decision not to respond. It basically just didn't come within our purview.

With regard to the information relating to the schedule, Your Honor, we're not maintaining that M-Tech was privy to that schedule. That was from a contract database that was maintained by AlixPartners identifying contracts that were contemplated to be rejected. That was not something that the M-Tech had access to.

We presented it basically to indicate, to the extent intention was relevant, General Motors LLC and the debtors, rather, intention at that time to reject. It has not been authenticated. It was our understanding, and perhaps incorrectly, that it was not necessarily to authenticate

documents for the purposes of this hearing and that if it were necessary, if there were a dispute with regard to facts, et cetera, that then we'd have the opportunity to be able to present --

THE COURT: Well, you understand --

MR. WEISS: -- testimony.

THE COURT: -- my case management order right, but of course the authentication wasn't so much a matter of concern to me as Ms. Klaus' underlying evidentiary objection and the related substantive rule, which is that as a general matter in the law of contracts, uncommunicated intentions, intentions not communicated to one's counterparty, for the most part aren't admissible or relevant.

If -- do you think that's not a fair characterization of the law?

MR. WEISS: No, I think that's a fair characterization of the law, Your Honor. And if, in fact -- we included that in case the Court thought that for some reason, based upon whatever arguments that were presented to it, the Court felt that intention was relevant. But we happen to agree with you. We don't think the intention -- it's not necessary for the Court to come to that issue.

THE COURT: When was that document created?

MR. WEISS: That document -- actually, I think we have several different snapshots but I believe the dates were some

time -- we showed three different snapshots. One in, I believe, July.

THE COURT: Of '09?

MR. WEISS: Correct, Your Honor.

THE COURT: Uh-huh.

MR. WEISS: There were --

UNIDENTIFIED SPEAKER: May, I think they began.

MR. WEISS: Maybe May, July. There were three different snapshots --

UNIDENTIFIED SPEAKER: June 4th.

MR. WEISS: -- of that document we tried to present to show consistency with regard to the debtor's intention with regard to that document.

THE COURT: Well, my tentative, subject to your rights to be heard and Ms. Klaus' rights to be heard, is you could use it as a prior consistent statement. If you can prove that it was created then, is indicating that you didn't later fabricate your position but that you can't use it affirmatively against them.

MR. WEISS: Okay, Your Honor. If I may, just very briefly. And we'll rely on the documents and any other questions the Court may have but I think based on the objection that M-Tech has filed today, the issue before this Court is to determine what was the contract that was assumed and assigned. And I think the debtor -- there's no dispute as between the

debtor and the party assuming and assigning the contract and General Motors, LLC. It was the blanket order as identified on -- by the debtor.

There's no dispute further -- and I think it's confirmed by the confirmation that was received by M-Tech, which they have presented to the Court as an exhibit to their pleadings, which was jointly presented by both the debtor and by General Motors, LLC, at that time, again confirming that the only document agreement that was being assumed and assigned was the blanket order. According to Your Honor, there's absolutely not a scintilla of evidence before this Court, and no basis even in M-Tech's argument, that there ever was a lease that was assumed and assigned in connection with this matter.

According -- Your Honor, we ask the Court to look at the four corners of the evidence that have been presented to it and rule that, in fact, it was the blanket order that was assumed and assigned and no other document. Thank you, Your Honor.

THE COURT: Okay. Thank you. Ms. Klaus.

MS. KLAUS: Thank you, Your Honor. Again, for the record, Kate Klaus on behalf of M-Tech.

Answering your questions, Your Honor, it was a very confusing time for creditors like M-Tech. We did get notice that a contract was going to be assumed and assigned. From M-Tech's point of view, there's one contract and that's the

lease. We had no notice of any kind of blanket order or that GM considered there to be a separate contract for the janitorial services.

And our basis for this assumption is the fact that the lease itself contains a provision that requires us to provide janitorial services. We had no idea that GM considered there to be -- the lease to be, essentially, bifurcated, one for renting the property and the other for providing these janitorial services, because we had an integrated contract as of 1986 when the document was first created.

When we first got notice, we didn't get the password that would allow us to enter the website and find out the amount -- the cure amount which is what we were concerned with because we believed there was only one contract. When we finally did get that -- and we filed an objection because we didn't get the password and wanted to preserve our rights.

When we did get a password, we went on and saw that GM contended, or the debtor contended, that there was no amount to cure the default. And we disagreed with this and believed that there was about 65,000 dollars some of which was rent and some of which was for past due invoices for janitorial services. We therefore filed a --

THE COURT: Pause right there. So, the component of what your client perceived to be what it would take to cure was the sum of amounts that would have due on the lease, presumably

stub rent or something like that, and in addition unpaid sums that would have been due if the purchase order was a separate contract?

MS. KLAUS: Correct, Your Honor, because we saw it as one contract requiring two types of payments: rent, and then excess janitorial services. And you can tell by our objection that this was our belief because we lumped them together. 65,000 dollars, about 35,000 of which was rent, which was paid after the assumption, and the rest remains due and that's for past due pre-petition janitorial services.

And that's why we filed the objection the way we did and our objection was limited to the cure amount. Again, some of which was satisfied upon assumption.

THE COURT: Now, you may be hitting this next but, you know, just like I'm taking a deposition, let me go with what you just said. Presumably, there would have then been a dialogue on cure amounts where you would say you owe me or my client x dollars for rent and y dollars for supplemental janitorial services. And what did GM say when you asked for the lease component?

MS. KLAUS: They continued to pay rent -- well, actually, the debtor paid the cure amount rent and then GM paid rent after the assumption date. They also paid the property taxes.

THE COURT: Wait. Old GM paid pre-petition rent?

MS. KLAUS: correct. It was actually the month between the bankruptcy and the assumption and assignment was paid my M-Tech -- or MLC. Starting with the month after the assignment, New GM paid the rent, which, again, to us, was confirmation that they were the new tenant under the lease. They also paid property taxes, which, again, was a tenant obligation and not an obligation under the transfer services agreement which is one of the arguments GM raises as proof of why it did not assume the lease.

So from our point of view, we got notice of an assumption, the notice and the confirmation both referred to blanket order but we had no idea what a blanket order was. And when we contacted the phone number on the notice, we just got a response -- kind of like, we'll look into it and left it at that. And so we assumed, once the contract was assumed and we started receiving rent from the new tenant, that that's what happened. The contract was assumed and assigned to New GM.

And the first we heard otherwise was sometime in September after several months when Jay Alix's folks told my people on site that we're moving out and this lease is going to be rejected. That's the first time we learned that GM contended it had assumed this blanket order and not the lease. And the reason why the blanket order could not have been the contract that was assumed is because it was not a contract, Your Honor. The purchase order attached as Exhibit 3 to GM's

pleading indicates that it's -- the commodity being purchased through the purchase order is a property lease. It's not a separate contract but just a method -- a mechanism of payment. Rent got paid from one arm of GM, janitorial services got paid through another arm.

We would issue an invoice showing what janitorial services we provided. GM would then -- or the debtor I guess, would then turn around and issue a purchase order reflecting those services and we would issue a request for payment. In no way, shape or form was the purchase order for services a separate contract. There's no dispute that something was assumed and assigned to New GM. And because there was only one contract between my client and the debtor, that's the contract that had to be assumed. And granted, it did not refer to lease but it did refer to a blanket order which in turn, we learned after the assumption and assignment, incorporated the lease. There's one integrated contract and that's what was assumed and assigned.

THE COURT: Okay. Thank you. Mr. Weiss?

MR. WEISS: Your Honor, very briefly. With regard to the blanket order, M-Tech, in its response, acknowledges the fact and they said, just to quote, "At some point, the Debtor began issuing purchase orders after M-Tech issued an invoice for services." So, they knew that there was separate process, if you will, an agreement with regard to this blanket order.

It contemplated services that were not provided for under the lease. Janitorial services in excess of the amount that was contemplated in these.

So they knew, they're on notice, that there is a separate agreement and order, however they characterize it today, that was part of the relationship between General Motors and M-Tech. And that was a blanket order. So, the bottom line, I think, Your Honor, from our perspective, is they should have been on notice to inquire further, to confirm the fact that, in fact, the leases weren't going to be assumed and, in fact, to assume by virtue of the fact that the blanket order is being assumed without any other description, we think is unreasonable.

So again, Your Honor, we believe you have to look to what the notice provided, what the confirmation provided and it was a blanket order that was being assumed and nothing else.

THE COURT: Thank you. Ms. Klaus, anything further?

MS. KLAUS: Very quickly, Your Honor. Again, Kate Klaus on behalf of M-Tech.

Your Honor, the purchase orders didn't require anything other than what was provided in the lease. Paragraph 12 of the rider to the original 1986 lease provides that "M-Tech will invoice for excess janitorial services and the debtor will, in turn, pay for those." That's in the initial lease. The purchase orders were an internal payment mechanism for GM

and in no way, shape or form a contract. So I just wanted to clarify what Mr. Weiss said.

THE COURT: Okay. All right. We'll take a recess. I can't guarantee you that I'll be ready by 11:30. But I would like you all back at that time. We're in recess.

MS. KLAUS: Thank you, Your Honor.

(Recess from 11:16 a.m. until 12:00 p.m.)

THE COURT: I apologize for keeping you all waiting.

In this contested matter, in the Chapter 11 cases of Motors Liquidation Company and its affiliates, M-Tech Associates, the lessor of real property that Old GM owns in Sterling Heights, Michigan, objects to Old GM's motion to reject the Sterling Heights properties lease. M-Tech contends that Old GM had previously assumed and assigned that lease to New GM when Old GM assumed and assigned a so-called "blanket order" for services relating to the Sterling Heights property.

I believe that the undisputed facts establish that the communications between the parties were faulty and that most, though not all, of the blame for that lies at the feet of Old GM and New GM. But finding, as I do, that Old GM did not seek or obtain leave to assume the M-Tech lease and that the documents related to the prior assumption and assignment were conspicuously silent in even referring to the lease or an intention to assign it, Old GM's motion for leave to reject is granted and M-Tech's objection is overruled. My findings of

fact and conclusions of law follow.

There here are no material disputed issues of fact. Neither side asked for an evidentiary hearing. My case management order, which provides in substance that factual assertions and motion papers are deemed true except where disputed, did its job and neither party has shown any basis for disputing the others' assertions of underlying fact as contrasted, of course, to conclusions, inferences or any resulting conclusions of law.

As facts, I find that in 1986, Old GM and M-Tech entered into the Sterling Heights property lease. Paragraph 12 of a rider to the Sterling Heights property lease said that "M-Tech would provide all services required by the tenant including maintenance repairs, janitorial and snow removal services for which Old GM was obligated to pay additional rent of 12,000 dollars per year. But Old GM was additionally required to pay any costs which exceeded the 12,000 dollars per year annual allowance and for real estate taxes and insurance. Old GM had full discretion regarding the level of services and could direct M-Tech as to who would provide those services.

The Sterling Heights property lease was extended and amended from time to time but none of the amendments altered that paragraph 12 of the rider. Though I'm doubtful that this fact ultimately is relevant, M-Tech notes, and it's undisputed, that the lease had an integration clause providing that it

couldn't be modified except by an agreement in writing signed by lessor and lessee.

Over the next twenty-three years or so, M-Tech performed the services described in the rider and sent the debtor invoices for any services exceeding the annual allotment. Old GM paid the invoices. At some point, Old GM began issuing purchase orders after M-Tech issued an invoice or perhaps before it did so. In approximately 1996, Old GM issued what it refers to as a "blanket" purchase order, TCB02218, to M-Tec, without an h, Associates, for the services provided by M-Tech exceeding the one thousand dollar per month allowance under the rider. A modified purchase order was thereafter issued, dated February 26, 2009, which provided that it would expire on February 28, 2010. After Old GM issued the purchase order, each month Old GM provided M-Tech with a "release number" relating to the purchase order for the services exceeding the one thousand dollar per month allowance under the rider. Each of M-Tech's monthly invoices for services exceeding the one thousand dollar per month allowance under the rider referenced the applicable "release number".

M-Tech says that the purchase orders mirrored the invoices. What that means isn't exactly clear to me. I don't know if it's right or not as it appears that the invoices reference the applicable release number making it pretty clear either that M-Tech knew what number each release number would

later bear or issued the invoices after the releases were issued.

M-Tech further states that it understood that each purchase order was used in order to facilitate payment and that it assumed it was an internal accounting procedure for Old GM as contrasted to a contract that superseded or modified the lease.

Of course, M-Tech's understanding, in the absence of a showing that the understanding was expressed to Old GM and Old GM agreed to it, is irrelevant. But to the extent it matters, and ultimately I conclude that it doesn't, I don't find M-Tech's belief, irrespective of which came first, the invoices or the releases, to be an unreasonable one. Its understanding might well have been correct but, ultimately, it's inconclusive.

Very early in Old GM's Chapter 11 case, on June 2nd, I entered an order approving the sale procedures that would ultimately result in the 363 sale which took place about a month later. That order set up procedures for the assumption and assignment of designated executory contracts. In connection with that, Old GM set up a secured website that listed each executory contract, that New GM's predecessor had designated to be an assumable executory contract. When the website was in operation as intended, each contract counterparty could view current information regarding the

status of its contract or lease with Old GM and the proposed cure amount that would be associated with it. For each contract designated for assumption and assignment, the procedures obligated Old GM to notify the counterparty with instructions for accessing the information on the website and the procedures for objecting to the assumption and assignment.

In addition to the contract website, Old GM maintained a database which it referred to as the "schedule" of all executory contracts to which Old GM was a party. The database identified which contracts were subject to assumption and which were to be rejected, though, at least often, the schedule didn't set forth when that would happen.

It is undisputed that by no later than May 16, 2009 the database showed the lease as to be rejected. The database used the notation "reject later" and never changed that.

The lease never appeared under the database with a designation saying that it would be "assumed", "assigned", or any words other than "reject". But it's further undisputed that this understanding on old GM's part was not timely conveyed to M-Tech. Indeed, so far as I can tell, that intention was never conveyed to M-Tech before this controversy blew up. So I can't rely on what that schedule said and, in particular, its use of the word "reject" as affirmative proof of GM's different intention.

Assuming, as I do, in the interests of litigation

efficiency, that GM will be able to establish that it was authentic and not backdated, I can rely on what the schedule said only as a prior consistent statement, expressing an intent before either Old GM or New GM had the motivation to fabricate.

Old GM says that it intended to occupy the Sterling Heights property for only a brief period, but in the absence of any indication that either Old GM or New GM conveyed that alleged intention to M-Tech or that M-Tech agreed to it I can place no reliance on this stated intention either. Ultimately, I must rely solely on what the documents said.

Conversely, by no later than May 16, 2009, Old GM listed the purchase order on the schedule and designated it for assumption using the notation "assume". But here, too, that suffers from the same affliction that the unstated in the intention vis-a-vis -- unstated assumption intention in the schedule vis-a-vis the lease and the intention to reject suffers from. It's admissible only to the very limited extent that the law of evidence permits me to consider prior consistent statements as negating the inference of fabrication.

Folks, Old GM's and New GM's conduct in this matter was not a model of good communication, and M-Tech's erroneous assumptions as to Old GM's and New GM's intentions are easily explainable. But the underlying fact is, that as the documents made clear, Old GM was referring solely to the purchase agreement and never expressed an intention to assume the lease

and assign the lease.

On some date in 2009 M-Tech contends that it received notice that the lease was going to be assumed by Old GM and assigned to New GM. Here I find that assertion to be contradicted by the relevant documents and the other undisputed evidence. Thus, I must find to the contrary. The relevant document captioned "Assumption and Assignment Confirmation Letter" was dated September 1, 2009. It was on a letterhead jointly bearing the names of each of Old GM and New GM. It described the "vendor", as "M-Tec", again without an h, "Associates", and had a "vendor identification" of "807178108". It provided, in relevant part, "This letter confirms that the executory contract(s) identified on Schedule A hereto was/were assumed by [Old GM] and assigned ... to [New GM] as of an effective date set forth on Schedule A annexed here to", here and to being separated. That's the way it is in the original. The Schedule A as relevant here included a table with seven columns which had entries in five of the columns and which were blank in the other two. Those that were filled out provided for a number "5716-00087452", under a column that's illegible. Another number, "YC802210," for "GM Contract ID", "M-Tec", again without an h, "Associates" as the "counterparty name", "blanket order" under contract type, and "assumed July 10, 2009" for contract status.

The columns under "Contract Name/Description" and

"Business Unit/Functional Area" were left blank. Significantly, neither Schedule A nor the letter that transmitted it used the word "lease".

On June 10, 2009 M-Tech filed an objection to Old GM's motion to assume and assign, matters with respect to rejection not having come up yet. In its objection M-Tech stated that it hadn't been able to access the Web site as it hadn't yet received a user name and password. In addition, M-Tech sought adequate assurance that Old GM would pay the cure amount and renew the liability insurance policy, compensate M-Tech for the default, though M-Tech didn't say how or in what amount, and continue to honor its obligations under the lease.

It's clear from a reading of that objection that M-Tech was then talking about the lease and not the purchase order, or at least not solely the purchase order, perhaps because M-Tech hadn't seen what was on the Web site and especially, the schedules.

M-Tech's later objection, dated six days later, and which was said to supersede its predecessor, no longer made reference to the lack of a password and an inability to access the Web site, but it continued to talk about the lease and not the purchase order or, at least, solely the purchase order.

Why M-Tech continued to refer to the lease when it had knowledge of what was posted on the Web site by then, and review of what was on the Web site would have revealed no

mention of the lease, is not apparent from the record. But it can't be disputed that what was posted on the Web site made no mention of the lease, and, instead, referred to the purchase order and deed with numbers that corresponded to the purchase order. The lease did not have such numbers on it, nor could it reasonably have been construed to be a "blanket order".

I can find no reference in the motion papers to any reply by Old GM in which Old GM stated, in words or in substance, what are you talking about? We were talking about the purchase order and not the lease. We're not trying to assume and assign the lease. I wish Old GM or New GM had said that. A response of that character at that time would have been helpful. But there is no evidence that either Old GM or New GM said, in words or substance, that the lease was being assumed either. The intention to assume the lease, as compared and contrasted to the purchase order, was never expressed to M-Tech.

A little less than two months later, on September 1st, Old GM and New GM sent the letter I described a few minutes ago. At this time, too, they did not make the "what are you talking about" observation that I think would have been helpful, but once more they made reference to what can only be read as the purchase order and did not identify the lease as having been assumed or express any desire to assume the lease. About three months after that Old GM informed M-Tech that it

was rejecting the lease, occasioning the objection we have here.

Turning now to my conclusions of law or, to the extent they might be regarded as such, mixed questions of fact and law, M-Tech contends, in substance, that the lease cannot now be rejected because it already was assumed. I cannot agree. Though I can't rule out the possibility that M-Tech, by making assumptions and/or failing to ask, was subjectively under the erroneous understanding that the lease was being assigned, neither Old GM nor New GM said anything about assigning the lease. Any view on M-Tech's part to the contrary was unfounded based upon anything that the documents actually said. The lease was not a "blanket order," and had no GM contract ID. The contract ID was instead the one on the purchase order, and that was apparent on inspection of the two documents at the time.

As importantly, or more so, Old GM did not take any of the actions required by the documents or the sale agreement or the law to assume and assign the lease. The lease wasn't identified in that or any other notice. The lease wasn't listed on M-Tech's contract Web site.

By noting these facts and holding in this fashion I mean no disrespect to M-Tech or its counsel, nor do I find fault with either of them. This is not a finding of negligence or estoppel. If either M-Tech or its counsel had contacted Old

GM or New GM or the counsel for either and said we understand that you're assigning the lease M-Tech or its counsel would simply have been told, consistent with the schedule that was then in existence but hadn't been handed over or shown to M-Tech, that the lease wasn't being assigned. The unlikely event that either Old GM or New GM told M-Tech something different, we then might have had an estoppel or a different factual finding, but, of course, that, here, isn't the case.

Nor can I agree that the lease could be deemed to be assumed by implication. First, as a factual matter, while Old GM and New GM may have made payments on the lease, including on pre-petition debt, that M-Tech might have understandably regarded as curing defaults under the lease and being consistent with an assumption of the lease, there's no evidence in the record that either Old GM nor New GM said, in words or substance, that Old GM had assumed the lease or that New GM had taken an assignment of it.

More fundamentally, even if Old GM or New GM had, in fact, said something to that effect, it wouldn't be legally effective. Well, one can find a few cases around the country supporting the notion than an executory contract can be assumed by implication. Those cases run contrary to express provisions of the code, which require the Court's approval on an assumption, and especially run contrary to the case law in this district, which doesn't permit assumption by implication or by

conduct.

As my colleague, Judge Gropper, noted in Tower Automotive, 2007 B.R. LEXIS 2219 (Bankr. S.D.N.Y. June 29, 2007), and I'm quoting, "It is not uncommon for litigants to assert that a debtor's post-petition acts constitute implied assumption of a contract. Courts have not favored this concept, as it would burden an estate with administrative claims that have never been brought to light and subjected to creditor scrutiny and judicial approval." That's at *9 of that decision. And as my colleague Chief Judge Gonzalez observed in Enron, relying on the First Circuit's decision in the Filene's Basement case and late Judge Schwartzberg's Child World decision many years ago in this district, and, again, I'm quoting, "The assumption of a contract cannot be implied because notice to creditors and court approval is specifically required before contractual burdens can be imposed on an estate". In re Child World, 147 B.R. 847, 852 (Bankr. S.D.N.Y. 1992).

"Court approval ... provides protection to the unsecured creditors whose claims could be prejudiced by potentially burdensome contracts - ones that may have driven the business into bankruptcy in the first place .... It also insures that the [unsecured creditors] committee has an opportunity to object." In re FBI Distribution Corp., 300 F.3d 45. FBI Distribution Corp. is, of course, the name for the

successor debtor in the Filene's Basement case.

My colleague Judge Drain has held similarly. See In re A.C.E. Elevator Company, 347 B.R. 473, 484 (Bankr. S.D.N.Y. 2006) ("Implied assumption has no place in the law of executory contracts").

Frankly, folks, I'm not sure whether the purchase order was itself an executory contract, as its mutuality of obligation was a little soft, and it may well have been, as M-Tech argues, duplicative of the lease and adding nothing new in the way of obligations. But it wasn't unreasonable for Old GM to regard the purchase order as executory, and, assuming that the purchase order wasn't, that doesn't mean that Old GM assumed and assigned the lease, which had a broader array of obligations, instead. As I've noted, the lease itself was never designated or noticed for assumption, and the lease's assumption was never approved by me or by any other judge of the Bankruptcy Court.

Whether or not the purchase order was properly assumed and assigned or could have been assumed and assigned is, ultimately, irrelevant to whether the lease, which was not mentioned in the assumption motion or related schedules, was, itself, assumed and assigned.

Finally, I agree with Old GM's and New GM's point that because of M-Tech's objection, as stated back in 2009, nothing could have been assumed. It was practical back in 2009 for Old

GM and New GM to provide that if objections were based solely on the cure amounts for the contracts proposed to be assumed and assigned they'd be assumed first, and cure amounts would be fixed later. That so, because New GM was willing to pay whatever was agreed upon, or a Court would later rule in the way of cure costs on the contracts that it took.

But comparable arrangements couldn't be made if more fundamental objections to assumption and assignment were raised, such as those that the contract wasn't executory or that the contract to be assumed and assigned and another contract to be rejected were inseverable (sic) for assumption and separate rejection. Both kinds of contentions would be showstoppers, as my decision in In re Adelphia Business Solutions, 322 B.R. 51 (Bankr. S.D.N.Y. 2005) makes clear. For objections of that character M-Tech's objection couldn't have been considered on the merits without consideration of the issues that were deferred for subsequent judicial determination under sale order sections 2(b) or 2(c). "determining whether a particular Assumable Executory Contract is an executory contract that may be assumed and/or assigned," or "challenging, as to a particular Assumable Executory Contract whether the debtors have assumed or are attempting to assume such contract in its entirety or whether the debtors are seeking to assume only part of such contract" that they are attempting to assume.

Objections based on either of these contentions

weren't then adjudicated, and, instead, the objector's rights were reserved.

Though my order, contrary to New GM's contentions, didn't expressly say that executory contracts couldn't be assumed and assigned in the face of such objections, a judge couldn't responsibly have permitted a contract subject to a 2(b) or 2(c) objection then to be assigned.

M-Tech, or other creditors or counterparties with similar contentions wouldn't lose their rights to the consideration of objections of that character, but, at the same time, with objections based on such premises or with objections of such breadth, there couldn't yet be an assumption and assignment either.

M-Tech contends in its surreply on this motion that the "schedules" to which New GM referred in New GM's earlier reply, which showed the lease as a contract to be rejected but lacked evidence that that thought or intention was ever conveyed to M-Tech, can't be relied upon. I agree with M-Tech, in part, but, ultimately, only in part. As I noted in oral argument today, and as I've noted in a different context above several times, I think, parties can't base substantive rights on intentions that weren't expressed to the other side. But M-Tech has contended in its surreply that the schedules were "probably created for the purposes of this motion", see surreply at 2, and, in essence, it's raised the contention of

fabrication, of eleventh hour fabrication.

If authenticated as having been duly created by Old GM and having been created before this controversy came up, which we're now in a position, this having done, there the paradigmatic example of a prior consistent statement as having been prepared before Old GM had a motion to fabricate. They're inadmissible for showing the point which Old GM and New GM would presumably love to use them for, that there was an express inattention to reject and not to assume. But they're admissible for the limited purpose of refuting the accusation of eleventh hour fabrication.

Other statements by M-Tech, for example that "there was only one contract between the debtors and M-Tech," surreply at 2 are ultimately just one party's view of the evidence or are contradicted by the documents. Similarly, M-Tech's contention that the payment of rent under the lease after July 10, 2009 wasn't "assumption by implication," but, instead, was "assumption by conduct consistent with the Court's procedures for the assumption and assignment of the contract" is, ultimately, a distinction without a difference. And it's just as contrary to the law in this district precluding findings of assumption by implication or, simply, precluding findings of assumption except upon a court order in which creditors and the Court know what the estate is proposing to do.

Old GM is to settle an order in accordance with the

foregoing, providing, in substance, for the rejection of the lease. It is not to purport to characterize the lengthy ruling that I just dictated. Instead, it is to merely say that for the reasons set forth by the Court on the record the motion to reject is granted.

The time for M-Tech to move to appeal this determination will run from the time of entry of the ensuing order and not from the date that I'm now dictating this decision. Am I correct that we have no further business today?

MS. KLAUS: Thank you, Your Honor.

THE COURT: All right. Thank you. We're adjourned.

(Recess from 12:39 p.m. until 2:11 p.m.)

THE COURT: Good afternoon. Have seats, please. Okay, we're out here again in Motors Liquidation Company. We have the apartheid claims. Let me get appearances and then I'll ask you sit down. I'll have a couple of questions.

MS. ZAMBRANO: Good afternoon, Your Honor. Angela Zambrano --

THE COURT: Your name again, please? Could you pull the mic --

MS. ZAMBRANO: Sure. Angela Zambrano with Weil, Gotshal & Manges, on behalf of the debtors --

THE COURT: Okay.

MS. ZAMBRANO: -- here with my colleague, Joseph Smolinsky.

THE COURT: Right. Okay.

MS. SAMMONS: Your Honor, Diane Sammons with the law firm of Nagel Rice, on behalf of the Botha claimants.

THE COURT: Okay.

MR. OLSON: Good afternoon, Your Honor. Steig Olson from the firm Hausfeld, LLP, for the Balintulo plaintiffs.

THE COURT: Okay. Folks, after the Second Circuit issued its Royal Dutch Petroleum Company, the debtors submitted a supplemental submission giving me that decision. If the class plaintiffs responded to it, we don't have a record of any response. That case, subject to your rights to be heard, has the potential for being a major showstopper

I'll need help from the class plaintiffs as to whether this claim is still being prosecuted in light of that holding, and if so, why there wasn't a submission to help me understand the continuing basis upon which the claim would continue to survive after that.

I would also like parties -- assuming that there is a continuing basis for the prosecution of the claim -- to slice and dice the underlying class action issues with a bifurcated approach, dealing with them at the traditional plenary litigation civil procedure level, and then impressing upon the analysis any additional considerations which seemingly are imposed in bankruptcy courts.

I do need help, first though, in understanding, Ms.

Sammons and Mr. Olson, what your position is with respect to Royal Dutch Petroleum. I think I'd better hear from the class plaintiffs first. Mr. Olson?

MR. OLSON: Absolutely, Your Honor.

THE COURT: Main lectern, if you would, please.

MR. OLSON: Say that again, please?

THE COURT: Would you come to the main lectern, please?

MR. OLSON: Yes, Your Honor. Again, Steig Olson from Hausfeld, LLP.

Let me begin with the Kiobel ruling. The first question -- the answer to your first question is that we did not submit a supplemental brief to the Court, so you haven't overlooked anything.

The reason why -- and we apologize if that would have been the expectation in bankruptcy court. We're admittedly new in bankruptcy court and certainly may not appreciate all the typical practice. The reason why we didn't submit a brief is, one, we knew we'd be here today, shortly after the supplemental brief was filed and would have the opportunity to address the case with Your Honor. And number two, just procedurally, it wasn't clear to us that a supplemental brief was appropriate. There wasn't a new motion filed for us to respond to, so that was our judgment. And again, we apologize if the Court would have appreciated a supplemental brief.

THE COURT: You understand the perspective of a judge who very often has to rule on the same day as an argument, in trying to be prepared beforehand?

MR. OLSON: Well, I do. Again, admittedly, you know, and I did -- I've clerked for two different judges. But neither of the judges I've clerked for typically would rule on a matter like this on the same day. And again, if that's what Your Honor typically does, I certainly apologize for not having advised the Court sufficiently in advance of the hearing what our position was.

The other aspect of it is, this is an evolving situation that we're dealing with. The Kiobel decision came down in mid-September. It's not in our case, of course. One of the attorneys who is in our case does work on the case, and we've been in contact with that attorney to learn about the decision and what's going on before the Second Circuit relating to the Kiobel decision. And that has been an evolving process, such that I believe on Friday, the plaintiffs in the Kiobel case filed a request to file a reply to their motion for en banc reconsideration. So we've been gathering that information. And now the briefing on en banc reconsideration is complete.

The other sense in which it is an ongoing situation such that if we had filed something the beginning of -- or directly after this brief may have become mooted very quickly,

is that we just don't know, very candidly, Your Honor, the effect of Kiobel on our case. And I understand that's the Court's main concern.

It would certainly have been one possible outcome that after the Kiobel decision the Second Circuit panel that heard our appeal -- and at any time, Your Honor, I'm happy to review any of the procedural history -- but we argued the appeal by the non-GM defendants in our case in January of this year, 2010. One possible outcome of the Kiobel decision was that the panel in our case would have very quickly or relatively quickly issued a two-paragraph summary order dismissing the appeal, perhaps dismissing the case, perhaps issuing some other mandate to the district court, in light of the Kiobel decision, because on its face the Kiobel decision certainly has an effect on our case.

We have been waiting to see if that would happen. It has not happened. It could happen today, it could happen tomorrow, we don't know. But we anticipate that the Second Circuit will do something in light of the Kiobel decision.

But that raises what I think is the most important point for us to communicate to the Court. Which is that the Kiobel decision was extremely surprising. It literally came out of -- not literally. It came out of left field in the sense that the issue of corporate liability under the Alien Tort Statute was never an issue in that case ever. There was

not one brief that was argued that argued that point on either side. The issues on appeal did not involve corporate liability under the Alien Tort Statute. The argument did not touch on corporate liability under the Alien Tort Statute. The defendants in that case did not raise it as an appealable issue. No briefing was requested on it.

The first time that anyone had any notice that there was an issue in the case was in the middle of September, when the Second Circuit issued its decision finding there was no corporate liability under the Alien Tort Statute.

So that was surprising and it's extremely unusual. It's extremely unusual that two judges of the Second Circuit would issue an opinion on a very significant question, which, incidentally, made the Second Circuit the first circuit to ever hold that and is contrary to the holding of another circuit directly contrary.

It's extremely unusual that there would be a ruling like that without literally any argument or briefing on the matter at all.

THE COURT: Pause, please, Mr. Olson.

MR. OLSON: Yes.

THE COURT: I guess what I was taught, or at least an assumption under which I've been proceeding for the last forty years, ten as a judge, is that to raise an issue on appeal you've got to preserve it or raise it below. Are you telling

me that that wasn't done here?

MR. OLSON: Absolutely, Your Honor.

Not only that, the parties in Kiobel; the defendants, didn't raise it on appeal. They not only didn't preserve it below, they didn't raise it on appeal.

Now, the answer to Your Honor's correct instinct about why it seems bizarre that the Second Circuit would do that, the hook that the two judges of the panel used, was to rule that corporate liability under the statute was an issue of subject matter jurisdiction.

THE COURT: Which can never be waived or neglected.

MR. OLSON: Absolutely. And -- yes.

THE COURT: I understand that. But what I'd like to have a dialogue with you on, Mr. Olson, and although you may not appear that much in bankruptcy court, but let's all make believe, And I'll fantasize for the extra eight percent in pay, that I'm a district judge. No matter how -- let me use a delicate word, ill-advised the ruling by the panel might have been -- or the majority of the panel, am I missing something or is what they say binding upon me?

MR. OLSON: Well, let me skip ahead. I was giving the Court some background.

Essentially, Your Honor, the significant point is that there's been an en banc petition for rehearing filed in the Kiobel decision. That -- briefing on that just recently

completed -- has been completed and hasn't been ruled upon.

The reason why I give the Court the background is because we believe that the en banc petition actually raises very significant issues and has a reasonably solid chance of success. The reasons for that are specifically, there was an extremely vigorous dissent in the case itself by Judge Leval. And --

THE COURT: I'm aware of that.

MR. OLSON: You're aware of that, of course.

Now -- and just to finish, if I may. In our -- one would expect that in light of a decision like that the panel in our case might have very quickly said well, your case is done because of Kiobel. But they haven't. And now it's been, you know, two months.

So there's also reasonable expectation that at lest two of the judges in our case have very serious concerns with the Kiobel decision. And I can go into that in greater detail if the Court would like. But we believe there's quite a few signs pointing in that direction. So that's three judges and there are other reasons to think that there -- a lot of the judges on the Second Circuit have concerns.

So there's no question that Kiobel is potentially -- it's potentially fatal to our case. Not necessarily, but potentially, if it stands. But it's by no means certain that it is. And it's by no mean certain that that decision will

stand. And so that's -- as I said, it's one reason why we didn't immediately fire off something to the Court because this is an evolving situation.

What we think would not make sense would be for this Court to immediately issue a ruling that would not only assume that Kiobel will stand, but that it has a decisive impact on our case. Because those things are just simply not the case.

Now, I think the Court has some options in that regard. And, again, I'm sure you have a much better sense of your options than I do. But what we would think would make sense would be to not do anything which would prejudice our class claims in this matter, until it's -- the final status of that Kiobel panel decision is clear, and very likely it's clear of the effect of the Kiobel decision on our case. Because depending on a variety of circumstances, Kiobel could be fatal, it might not necessarily be.

Now, how the Court gets there I'm not exactly sure. I do understand that one option would be to estimate the class claims in this case. And that would -- by doing that, as I understand it, the approval of the plan would not be held up. And we are willing to work with the Court and with the debtor in any regard to have that happen. We have no desire to have the plan held up. And then we could revisit this issue once the legal landscape is a lot clearer, which we would expect it would be.

THE COURT: Uh-huh.

MR. OLSON: So that's essentially our point under Kiobel. I could go into why we think the merits of the decision are wrong. I could explore anything else. And I could also proceed --

THE COURT: Well, the problem I have, Mr. Olsen, is that between you and me I don't always agree with every decision of the Second Circuit, especially on areas where I have some expertise; like bankruptcy.

But I've never considered myself allowed to make that kind of a determination in any way other than in private to my law clerks and to my wife. And I do what the Second Circuit tells me and I got to follow controlling law of the Second Circuit.

The rule, for instance, is not the same with respect to district judges. And if I think district judges have blown it I feel like I've got a lot of walking around room, but I don't feel like I have that same luxury with the circuit.

Apart from that I have concerns that are unique to bankruptcy about the late certification motion, the effect on the remainder of the creditor community, and the delay that would be occasioned by holding up distributions to the creditor community in my case, who've suffered plenty. Because of the potential for any class claim to have such a dilutive effect upon their recoveries.

Subject to your opponent's rights to be heard, I would think that individual claims on behalf of your clients, and keeping them alive, would be no big deal. But I had thought until I started getting into the implications of the Kiobel case that there were some fairly serious hurdles for you to get over as a matter of pure bankruptcy law, which at least seemingly would impair the ability to certify a class even if they wouldn't be show stoppers on the individual class representatives recoveries in their own name.

MR. OLSON: Yes, Your Honor. Let me address those briefly.

First, absolutely, we would never suggest the Court should not follow Second Circuit precedent. We just make two points.

One, given the pendency of the rehearing motion I don't think it would be prudent for any judge in the Southern District of New York or in the Southern District of New York Bankruptcy Court to assume that the decision by two members of the Second Circuit in a panel decision is final. It's just not final in that sense. There's a rehearing petition pending, it has not been ruled upon. And not only that which we think is sufficient as we've explained to the Court, there are very good reasons why we think that the case will be heard -- will be reheard en banc.

So I just -- I don't think any -- I don't think it

would be prudent for a judge trying to follow the Second Circuit's instruction to take a potentially prejudicial action in a case when the Kiobel panel decision may well not be the ruling of the Second Circuit. Number one.

Number two, as I mentioned, our case is on appeal in the Second Circuit. And notably, the Second Circuit has not ruled on our case. So that's we believe a very significant sign. The Second Circuit has in no way indicated to this Court that our case must be dismissed. It may do that but it certainly may not. So we don't think that -- we think that the prudent approach by a judge, who, of course, has to follow Second Circuit precedent, would be to simply wait to see what the Second Circuit's final holding is in this matter.

Now, as far as the timeliness of our certification motion. I understand the Court's reference that it was late. We would submit, Your Honor, that, you know, in terms of following circuit court precedent, it's by no means clear that our motion was late.

The Second Circuit has never ruled that it would be even proper to file a motion under Bankruptcy Rule 9014 for 7023 treatment prior to an objection to the class claim being filed, which creates a contested matter. The Second Circuit has not ruled that.

The only circuit that I'm aware of that has ruled on that issue is the Eleventh Circuit in the Charter Company case.

And the Eleventh Circuit ruled that it would not have been timely for us to file our motion until there was a contested matter when the debtor contested our class claim. And, in fact, until that point we are entitled to presume that our class claim was not objected to and there was not a contested matter.

So putting the practicalities aside for a moment, as a legal matter, we don't believe our motion was late under any precedent. We recognize that Southern District of New York courts have gone back and forth on this. But even Judge Rakoff in the Ephedra case, who said, you know what, you don't have to wait for the objection. At the same time said the rules are so opaque that I would never -- I don't know if he said I would never. That I would not take a prejudicial holding against someone who did wait for the objection to be filed.

So we believe we -- our motion was timely under the law.

As a practical matter, the Court referred to the creditor community. Which, of course, has to be the Court's primary objective to protect that community. The point we would make there, Your Honor, is that we believe that we're a member of that community.

It should be pointed out that we have pursued these claims on behalf of a humble group of plaintiffs for eight years, very doggedly. We've been up against incredibly well-

funded multinational corporations and law firms who have taken us through two district court judges, up to the Second Circuit twice, up to the Supreme Court, and our claims are still standing. And they're very significant claims. In some respects the eyes of the human rights community worldwide have been on our case for the last eight years. And there are thousands of people in South Africa who believe strongly in this case, and believe strongly that they have claims against GM. And they're creditors too, as I understand bankruptcy law.

And so we would respectfully request that when the Court considers the interest of the creditor community that it does not overlook the people in our case.

Now, the question then becomes is it fair to the absent class members who didn't file proofs of claims to expunge their claims, and only let the named plaintiffs proceed. And here, Your Honor, I respectfully suggest we believe we're on very solid ground, that that would be completely improper. And the reason for that is the notice that was given in this case cannot be defended as reasonable or justifiable to reach the absent class members in this case. Absent class members that GM knew about.

For eight years we've litigated this case, it's been a significant case to GM. And they know where these people are. They know they're in South Africa. They know they're impoverished. They know they are poor victims of horrific

violence, in many cases. They know that these people are not educated. That they are living in segregated communities. That they are subject to many issues as far as education and health. They know that they live in townships that are segregated. And that for many of them English is not their primary language.

Now, the standard for notice as GM, itself, stated in its motion to expunge on page 16, was "The proper inquiry is whether the debtor acted reasonably in selecting means likely to inform persons affected by the bar date." That's the standard.

So GM today must defend its decision in light of it knowing of this group of creditors, to publish notice in the international editions of the Financial Times, the Wall Street Journal and USA Today. Those are the only publications which even, arguably, might have reached South Africa.

Now, we recognize, Your Honor, that publication notice has often been accepted. And we recognize that you can't always design publication notice in a way that reaches everyone. But at the same time the notice requirement of the due process clause must have some teeth. It cannot be rendered a nullity.

The Supreme Court in Mullane v. Central Hanover Bank & Trust, ruled that "When notice is a person's due, process which is a mere gesture is not due process. The means employed must

be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it."

So for GM to prevail on the notion that sufficient notice was provided to this unidentified group of people in South Africa, it must demonstrate that it would have been reasonable for one actually trying to notify those people that they had a right to file a claim because they were potential creditors. That it would have been reasonable to reach them, someone really wanting to do that, by publishing in the Financial Times, the Wall Street Journal and USA Today.

That we believe, Your Honor, is just facially an unacceptable proposition. Particularly in light of the fact that as we demonstrated in our papers, reasonable and inexpensive alternatives were disregarded. We have shown in our papers that there were many South African national or regional publications that could have very cheaply been a forum for notice to these people. And if that had happened we wouldn't have a notice argument. But it didn't happen, and GM knew of these people. And so we must presume that there was a reason that those venues were not utilized.

And so given that, Your Honor, we think that it would be patently unjust and unfair to expunge the claims of these creditors, the creditors, because they never had an opportunity. They weren't given due process, they weren't given notice.

In light of that, we believe that the Court should exercise its discretion to permit class treatment in this case. Because it's really the only way in light of what has happened to assemble the full group of creditors that should be assembled in this case.

As we understand it, the purpose of Chapter 11 bankruptcy is to determine what the debtors' entire debts are. And to determine based on this who is entitled to what. And if class treatment isn't utilized in this case, a group of creditors will have been expunged without notice, without process, and without reason.

In this case the named plaintiffs are the champions of the rights of those people. As the Second Circuit observed in the American Reserve case "Sometimes holders of contingent claims need a champion of their rights to appear in bankruptcy court." And this is one of those times.

Now, as far as the appropriateness of class certification, we understand this is generally a two-step inquiry. One is should the Court use class treatment, should it apply Rule 7023.

THE COURT: Yes. That's the bankruptcy issue. From what I would call a plenary litigation perspective. I don't have too much in the way of concerns vis-a-vis your 23(a) showing, but I do have your concerns about your 23(b)(3) showing.

MR. OLSON: Absolutely. And that's where I was moving, Your Honor.

I will say that Ms. Sammons was going to touch on these issues, as well, but perhaps --

THE COURT: That's fine.

MR. OLSON: -- I'll set the table on them.

We believe, Your Honor, that certification of this class under Rule 23(b)(3), which asks the question whether common questions of fact and law will predominate in the case. Not whether all questions in the case are common, but whether the common questions will predominate.

We believe this case meets that standard. There's no question that this case presents some complex issues, primarily legal issues. Some mixed questions of law and fact. But it is clear that the predominant questions in the case are ones that are common to class members.

The resolution of this case, as the Second Circuit proceedings show, will focus predominately on questions of law and fact that are common to class members. After all, in this case which makes it distinguishable from the Talisman case that GM talks about, and distinguishable from many cases where class certification is denied --

THE COURT: Talisman being Judge Coates' decision?

MR. OLSON: Yes. The reason we have this case is because the class members were targeted precisely because they

were members of a class. That's what apartheid was about. It was not treating people based on their individual factors, it was not looking at the individual merits of people and deciding who would be rounded up and segregated and deprived of an education and deprived of healthcare. And in some cases, physically terrorized in the most gruesome forms.

Apartheid didn't focus on individual characteristics, that was what the problem was. Apartheid inflicted injury systematically pursuant to a national policy precisely because people belonged to a disfavored class.

So in other words, our case, and the class members, have a coherence with Rule 23 in that what's challenged is class treatment. And that's why class treatment is an appropriate mechanism for pursuing liability for that.

Now, if you move from that to the questions in the case, which is what Rule 23(b)(3) says to focus on, perhaps the most significant question in this case of law and fact will be what GM knew about the purposes to which its vehicles were being put, and whether GM acted with the intention of helping, through the provision of those vehicles, to oppress, terrorize and inflict injury on black and colored South Africans. That's the question that must be answered.

We can talk at any time, Your Honor, about how we get to the resolution of that question, but that's the predominant question in this case. If this case is tried or resolved in

any manner that's the question that will override anything in the case. That question will focus squarely on the conduct of GM. It won't focus on the conduct of the individual class members. And the resolution of that question will be one of the primary vehicles for resolving this case.

THE COURT: Wait --

MR. OLSON: Other --

THE COURT: Pause, please, Mr. Olson. Because when I was preparing for this I wasn't thinking so much that the conduct of the individual class members will be that major a factor. But what I was concerned about is that if one grants what you said, which was one reason why I thought that on 23(a) existence of there being some common issues, wasn't one that troubled me. I think it's at least a fair inference, and, certainly, would meet, both Bell Atlantic and Twombly standards, for you to make an allegation that folks in South Africa were targeting their citizens. Maybe blacks weren't considered citizens, their folks, because of their race. The way by which they targeted them, they way by which they acted offensively to them wouldn't presume -- would at least seemingly vary in so many respects. That's what's really bugging me.

MR. OLSON: Understood, Your Honor. So let me address that.

First of all, this case is -- here we have GM, will be

a little narrower than that. I think the question, the primary question in this case will be what GM did to support the security forces of the apartheid regime, and what it knew when it did it, and what it intended when it knew what it was doing. Those are going to be the primary questions.

And Rule 23 does talk about commonality. But we shouldn't gloss over the fact that Rule 23(b)(3) says it's satisfied if questions of law or fact will predominate in the resolution of the action. And we believe those questions will predominate.

Now, the issue the Court raises we believe doesn't go to GM's liability, which is what we think will predominate in this case. But it goes into the question of injury. In other words, you know, people are injured in different ways. And, you know, how will the Court address that.

We recognize that that is true to some degree. However, Your Honor, in virtually every case where there's class certification injuries vary to some degree. But many courts have recognized that where the issues of liability will be the truly predominant issues in the case, the fact that the Court may have to find some ways to address differences in injury should not be an impediment to class certification.

For example, consider the Talisman case, which -- the Judge Coates' case which GM primarily relies on. There Judge Coates didn't deny class certification because well, some

people were shot and some people were maimed or injured in some different way. Judge Coates denied class certification because she determined that finding out the core question of liability could not be done on a common basis. Because that case involved a long history of inner-tribal warfare and civil war in the Sudan. So you couldn't just recognize that a class member was injured and attribute it to some national policy there. It could have been one of many, many different people who caused the injury on the class member there.

And so there wasn't this core question of conduct by the defendant which would take you most of the way to resolving the case. But that's very different here. The class members here were -- there's no question of tribal warfare or who injured them, or determining those types of questions and unraveling complex tribal or civil war issues. The people who were injured here were injured because of the national policy. And that's what -- as, again, I'll turn this over to Ms. Sammons in a moment, that's what makes this case more like the cases -- the admittedly complex cases sometimes, where class certification is granted.

For example, we refer the Court to the Klay v. Humana case. Second Circuit case -- sorry, I apologize. An Eleventh Circuit case from 2004. The case that the debtor, itself, cited. It drew the distinction that I'm talking about. There the breadth of the class was tremendous. It was, essentially,

almost all doctors in the United States.

But because the core question in the case involved a policy that affected all those people in some common way, the Eleventh Circuit recognized that the RICO claim in that case could be certified, notwithstanding the fact that there may be some differences in injury that would have to be sorted out in some sense.

So that's why we believe, Your Honor, that yes, there may be some individual issues that arise with respect to injury. But that's not prohibitive of class treatment. And in a case like this where the case is about injury because the members were members of a class those members of a class should be permitted to proceed.

The only other thing I would add on this note, Your Honor, is that some of the issues that may look messy at first blush in this case, some of the factual issues about injury, have actually been a long -- there's been a lot that gets them very close to resolution.

We know, for example, that the Truth and Reconciliation Commission in South Africa held six years of hearings where it interviewed the victims of apartheid. And extensive records and governmental findings were made about the types of injuries that those people suffered, and many of those people are class members in this case.

So there are -- there's a record that would be

available to the Court as in the Marcos case to deal with the injury component of the case once we get there. But it will be the liability component of the case that will predominate, and that's why we think class treatment is appropriate.

THE COURT: Pause. Are you telling me that that would be usable for collateral estoppel, is GM participating in that?

MR. OLSON: I don't believe GM participated. So I'm not sure we'd argue --

MS. SAMMONS: They didn't. GM did not participate. None of the corporate defendants, Your Honor, participated in the TRC.

MR. OLSON: They were invited to, they -- and I can't say specifically whether GM was, but multinational corporations who operated were invited to participate, but generally just refused to. So I'm not --

THE COURT: Well, my instinct, Mr. Olson, would be subject to your rights to be heard, that knowing the results of that and your conclusions would help you -- would be pretty much rock solid defense against anybody making claims that -- making irresponsible allegations, but would be much tougher for you to use as affirmative proof because of the traditional constraints under American law of use or imposition of collateral estoppel.

MR. OLSON: Well, I agree. I'm not necessarily suggesting that we've used collateral estoppel. But I think

there are some mechanisms that could utilize that record that could create efficiencies in this case.

Now, it may come down to whether GM wants to fight, you know, how much every person was injured, out or not, or would be willing to stipulate to some -- in some manner to those findings.

THE COURT: Well, you know, you're referring to GM. And it may have been GM when it was doing allegedly bad things, but the debtor that's on my watch, which is aptly called Motors Liquidation Company, is a fiduciary for a creditor community which, if anybody did anything bad it wasn't them. And we're beyond the point where GM could be saving its own skin in terms of its future survival. Right now the stakeholders in this case are the creditors or, as you articulated, the other creditors of the Motors Liquidation estate, which from the perspective of a lawyer who's counsel for a debtor-in-possession in a liquidating case, that would be instinctive to him. He ain't got a client anymore except that creditor constituency, and to a much, much lesser extent the people like AlixPartners who are trying to maximize the value of that estate.

MR. OLSON: And I understand that, Your Honor, and I apologize for referring to GM.

But I actually think that the point Your Honor makes counsels in favor of finding a way to resolve the creditor

claims by the absent members here on a classwide basis. Because as Your Honor points out MLC is not, you know -- let me put it differently, one of MLC's objectives is as a fiduciary to creditors. And as I pointed out there are people in South Africa who we believe have claims against the estate that MLC is overseeing.

But those people, and I don't think there's any way around this, didn't receive notice that would have allowed them to file claims.

So what are the options? The options are for MLC to convince the Court that those people should just have no claims. And their rights as creditors should be completely expunged, even though I think we can likely agree, very likely none of them received any notice that their claims were going to be expunged. That's one option. But it doesn't seem to me to be consistent with the fiduciary responsibility of an entity like MLC.

The other alternative, it seems to me, would be for the Court to permit class treatment and us to work with MLC and the non-governmental associations that we worked with in South Africa, to find a way to permit that community of creditors to have its rights respected and to participate. And I can assure the Court that we don't have any other objective than to be completely reasonable and efficient in allowing that process to take place.

It seems to me those are the two options. And the first one, we submit, violates the due process clause and is -- would be unjust. So, again, this is where I get to the edge of in the expertise, but when I refer to the Truth and Reconciliation Commission it doesn't seem to me to be obvious that it would have to be an issue of collateral estoppel, but rather that some procedures could be reached between the Court, between MLC, and between the class group if class treatment is permitted. That would allow for the estimation and then resolution of the class claims. And that would respect the right of that community of creditors that we believe should be respected.

THE COURT: All right, thank you, Mr. Olson. You want to hand off to your co-counsel now?

MR. OLSON: Yes.

THE COURT: Ms. Sammons.

MS. SAMMONS: Yes, your Honor. Diane Sammons with the firm of Nagel, Rice on behalf of the Botha plaintiffs.

Your Honor, I think my co-counsel has articulated in large part an outline of why class certification would be appropriate in this case. And I think he's done his best to address the Court's concerns regarding predominance.

Subject to Your Honor's specific questions, I would only add that with regards to the predominance argument that the notion of human rights cases being subjected to class

treatment is not unusual. And there's a series of cases upon which the Court can look to with regards to assistance, in that regard.

And I would suggest, the first case was the In re Holocaust Asset case. Which was a case in the Eastern District, Your Honor, where specifically there was class treatment. And a case against corporate defendants regarding the keeping of certain assets by defendant banks that were properly the subject of Holocaust survivors, and that was afforded class treatment.

I would suggest Doe v. The Gap, which is a Ninth Circuit -- well, it's not a Ninth Circuit case, it's a district court case, the Marios (ph.) Islands, but it's in the Ninth Circuit, Your Honor.

Similar case, multiple defendants stemming from -- involved in -- and all the folks that were involved in this case were from different factual backgrounds, working for different employees. They were suffering different injuries. And there were allegations that they were subject to involuntary hours; unreasonable hours with regards to their work. Involuntary servitude was the human rights claim that was brought against those particular defendants.

And despite the fact that there were multiple differences in terms of the damages, the court acknowledged and agreed that would bound the action together and the class

together, was a common policy with regards to how the defendants were treating these individuals. And they allowed class treatment to proceed in that case.

Likewise, Doe v. Karadzic. Another case involving Bosnian human rights violations. Multiple violations similar to the violations alleged here; torture, CDIT. Each of those claims the court, again, allowed to proceed forward on a class action basis.

Julio v. The Estate of Marcos, a Ninth Circuit case 1996. And that class was even more broadly defined, Your Honor, than this case. All civilian citizens of the Philippines who between 1972 and 1986; that's a period of fourteen years, who were tortured, some were summarily executed or disappeared by Philippine military or paramilitary groups, and survivors of the deceased class members.

In a very interesting procedure, Your Honor, the court separated liability from damages and then split the damaged part into three claims. I'm sorry, into three separate trials. One for compensatory damages and one for exemplatory (sic) damages.

And the court used inferential methods to estimate the value of the damage claims in that case. But it did proceed forward. And one of the things that the Court looks at in those cases is not just the common scheme, which is consistent throughout these human rights cases, but also common questions

of defense.

So in the Agent Orange case, another case where it was afforded class treatment, the court looked at common defenses, particularly whether or not in that particular case whether or not there was a military contract or immunity that would apply to all the particular defendants in the case.

Likewise here, the case on appeal raises multiple issues that are common. For instance, questions of political question and international comity, practical consequences, whether or not the ATS is meant to apply extraterritorially. So the fact that there are common defenses provides even a further foothold for this Court to find that there are, indeed, common issues. And those common issues do, in fact, predominate.

I would suggest that there's a series of cases that are now out of the Second Circuit that are very similar. They're not human rights cases, Your Honor, but I think they're worthy of merit.

One is Brown v. Kelly, it's a Second Circuit case that came down in June of this year. And it involved the DA's office; Bronx DA. And cops had a policy of enforcement of a particular law deemed to be unconstitutional; it was loitering. And even though the defendant suffered differing injuries as a result of arrest, the court said that because the DA's office and the police department had a common plan and scheme to

engage in improper arrests or unconstitutional arrests, that was the commonality that held the case together, even though there were differing individual injuries.

Likewise, Your Honor, in the Nassau strip case, another Second Circuit case in 2006. The police department there had a strip search policy on all misdemeanors, regardless of whether or not there was probable cause. And, again, the defendants had different injuries, yet the court held that the policy, itself, and the common policy, and the systematic nature of the policy was enough that predominance was suggested and ruled in that particular case. And there was class certification granted.

There are other cases, Your Honor, that I can point to, but I think those cases are a good guideline for this Court in terms of similar situations.

I would suggest that our case is even stronger for the reasons that my colleague had mentioned. Which is this is a classic case where our particular plaintiffs were treated differently because of their class. Apartheid by it's very nature created a system where there was systematic oppression. And that is what the court primarily looks at when it's looking at predominances, was there a common plan? And you can't get anymore common than treating a class differently by virtue of its race, than what we have in this case. And I don't think that's consistent with the other cases --

THE COURT: But pause, please, Ms. Sammons. You're conflating the plan of the South African government, or the South African decision makers, with a former General Motors' management.

MS. SAMMONS: I don't think so, Your Honor. Because if you go back to the complaint the complaint alleges -- and I'll speak specifically to the Botha complaint. But the complaint alleges, indeed, extreme particularity the actions of GM management and how they participated with the security forces in South Africa to enforce the apartheid structure. And it's very specific.

And by that I mean, Your Honor, there are allegations such as the fact that GM management were the ones that actually conveyed the employees who were actively involved in opposition to the apartheid regime. And as a result of them leaking that information to the police and the security forces in South Africa, these people were arrested and tortured and abused. And I would refer the Court, specifically, to the complaint. And I'm going to read from a particular paragraph in the complaint. This is the Botha complaint at paragraph 90.

And it describes one of our plaintiffs. And his name was Mr. Tamboer. And Mr. Tamboer was a shop steward in a particular organization NAAWU. He was required to inform GM when he left work for union activities. He was arrested on numerous occasions as a result of providing such notification

because of GM's collaboration with the government.

For example, on one occasion in '82, Tamboer was arrested and detained for weeks. During his detention he was interrogated and tortured because of his union activities at GM.

And, Your Honor, it goes on to explain, certainly the extreme nature of the torture. And, again, this torture was a result of GM's management indicating to the police that he was engaged in this activity. And I'm quoting now from paragraph 93, page 28 of our complaint.

"During his imprisonment Tamboer was repeatedly questioned by security forces about strike activity at GM. They choked him and bashed his head against the wall. Security forces also kicked him in the ribs and stomped on his ankles as part of their torture techniques. Tamboer suffered permanent brain damage and epilepsy as a result of injuries suffered during his arrest and imprisonment."

So, Your Honor, our intent is to plainly show specific instances where GM management was acting alongside with the police to engage in this improper activity.

Your Honor, aside from that I can certainly address typicality, ascertain ability or superiority if those are issues where the Court has concerns.

THE COURT: I have a limited amount of time I can spend on oral argument. I've already spent about six times

what an appellate court would.

MS. SAMMONS: And we appreciate that, Your Honor.

THE COURT: Do you have anything further to say about bankruptcy doctrine before I give your opponent a chance to be heard?

MS. SAMMONS: No, Your Honor, I don't.

THE COURT: All right. I'll hear from Motors Liquidation now.

MS. ZAMBRANO: Your Honor, as you know and as we've talked about, there are four reasons why these claims should be expunged in their entirety.

I don't want to belabor Kiobel, but I do want to make a couple of points about it.

First of all, respectfully, the claimants are, of course, just guessing as to whether there is an -- an en banc petition will be granted.

Certainly there has been briefing but there has been no decision. So Your Honor is correct that that is the law of the land presently.

I do want to note, though, that the Kiobel case was specifically grounded in Supreme Court decision in Sosa. In which they specifically instructed courts to look at whether the defendant at issue was subject to liability and international human rights laws. And, so, respectfully, I don't believe that it was a surprise at all. Indeed, I am told

and I have seen that in the appeal in this case there was specific request for briefing on the issue of human -- of the jurisdictional question. And so I don't know whether Kiobel parties were surprised or not. But, certainly, that issue was involved in this case.

THE COURT: Well, I'm a little confused, Ms. Zambano (sic). Did I get your name right?

MS. ZAMBRANO: Zambrano.

THE COURT: Zambrano, forgive me. I'm not as -- this is all with the assumption that I'm allowed to make subjective decisions about how to deal with a circuit decision that is now good law, but which may not be good law, depending on the outcome of events that are beyond speculation.

But while I and other judges try to guess movements in the law, what you said about inviting people to brief these issues strikes me as the more traditional way of --

MS. ZAMBRANO: Agree --

THE COURT: -- dealing with hard issues. I take it that if you disagreed with Mr. Olson's remarks to me about this not being raised earlier and not having invited briefing by the parties it may be equally binding on me, but it does raise my eyebrows.

MS. ZAMBRANO: I guess what I would say is I don't believe that the Kiobel decision was as much of a shock to the community as is being represented. Particularly to the

claimants at issue here, given that they briefed and they reported to Your Honor in the briefing on this issue, that the issue of whether a corporation could be liable under the Alien Tort Statute was an issue in the case. It's neither here nor there, probably. But I wanted to note it because I don't believe it was the shock to these claimants that was represented, given that they had briefed it and the court is specifically deciding it in their appeal.

Let me move on and just speak briefly about the Kiobel decision. And I won't belabor it.

The Second Circuit, as Your Honor has noted, has held squarely that corporations are not liable under the Alien Tort Statute. In that case, the Court, as you probably have reviewed by now, painstakingly went through the international tribunals that had considered the question. Going so far as to quote Nuremberg, looking at the international criminal courts, jurisdiction decision where it was specifically discussed and requested that corporate liability be permitted. And it was rejected.

Again, the tribunal decided that it was individual men and women who were responsible, not corporate bodies. The Kiobel court also noted, of course, that more recent charters establishing international tribunals in Rwanda and the former Yugoslavia had also rejected corporate liabilities. So reviewing a lot of precedent, the Second Circuit determined

that no corporation has ever been liable for a human rights violation, whether it's civil or criminal, ever been liable under customary international law of human rights.

And so it found that there was not only -- there was not just a unit -- there was not only a discernible -- there was no discernible norm of customary human rights violations that corporations could be liable, there was certainly not a universal rule that they could be liable.

So, of course, the sole basis of not just the putative class members, but, of course, the named plaintiffs, themselves, their sole basis in this action is an Alien Tort Claims act. And so the extent that the Court feels bound by Kiobel, and we would submit that it is, that the claim should be expunged in its entirety.

Now, notwithstanding the fact that we think it's dispositive --

THE COURT: Pause, please, Ms. Zambrano. Because if there was not a pending motion for en banc reconsideration of Kiobel it would be game set and match for you. Your opponent; Mr. Olson, has suggested an approach which --

MS. ZAMBRANO: You're referring to the delay?

THE COURT: Yes. But I'm trying to articulate it in a delicate way, which accounts for my pause, which, while it may not be practical, as long as this is a class action, because of the extraordinary, if dilutive, effect of a claim of this type

on the remainder of MLC's creditor community, might suggest that I rule only on the class action issues and that I continue neither allowing or disallowing the individual claims to give the circuit a little time to decide what it's going to do on the en banc motion, and/or for me to consider what it would do in the similar issues that Mr. Olson's non-MLC defendants might be subject to.

Am I right in my assumption if this isn't a class action you don't muchly (sic) care whether I continue the matter?

MS. ZAMBRANO: I would say this, we believe the Kiobel decision is binding. And even estimating the claims of these named plaintiffs is going to burdensome on this estate. It's going to require them under the Second Circuit Talisman decision to prove that MLC, in its prior form GM, aided and abetted apartheid. And that these particular people suffered injury as a result of that. And I don't think that's an easy task.

And so, respectfully, I think under the law in its present form, the claim should be expunged.

THE COURT: Uh-huh. Continue.

MS. ZAMBRANO: I'm going to turn then to the second reason the claim should be expunged, and that's, of course, as the Court has referred to, the Botha and Balintulo's belated request for bankruptcy class treatment in this case.

As this Court knows Rule 90 -- Rule 23 does not automatically apply to the claims process in bankruptcy. Instead, a class claimant must first specifically move under Rule 9014 for an order directing that 7023 apply. And, of course, 7023 at that point would incorporate Rule 23.

It is well established that the failure to timely file a Rule 9014 motion and request that the Court direct Rule 23 to apply to a claim, can be fatal to a claimant's ability to assert a class claim in bankruptcy, because of the radical effect that a class claim can have on a debtor's reorganization process. And I would say this is particularly true in a case like this where we have an unliqiudated claim of injuries that are quite unspecified and quite disparate as well, like the ones that we have here.

The question then is when is a claimant -- when are claimants supposed to seek approval from the Court to assert a class claim? The answer to that question is found in our case law. If you look back briefly at it it's -- the limited ability, of course, is not found in the code it is found in this case law.

Until 1989 it was widely accepted that claimants could not file a class claim. And in that year Judge Easterbrook of the Seventh Circuit decided In re American Reserve, the claims could be permissible -- could be permissible under the Bankruptcy Code. Although, the Tenth Circuit has not followed

that decision, the majority of courts around the country, including in this district, have, of course, permitted it. But they permitted it in limited circumstances based on this discretion of the bankruptcy court.

All of these courts have insisted that the claimants timely request permission from the bankruptcy court to proceed as a class, so that the class action does not, in the words of Judge Easterbrook, gum up the bankruptcy estate.

As Judge Bernstein explained in In re Woodward, one of the earlier decisions on this issue, "As the case moves forward toward its conclusion it is more likely that a delay in resolving certification issue will interfere with the administration of the estate."

For that reason, the Southern District of New York has consistently insisted that a claimant seeking class treatment ask the Court to apply Rule 7023 as soon as practicable.

There has been debates about -- among the Court outside of this jurisdiction about the first time that a claimant has to seek class -- first opportunity that a claimant has to seek class treatment.

Some courts have held that the request should not be made until an objection to the proof of claim has been filed. And claimant's counsel referred to that law. But that is simply not the law in the Southern District.

This issue was squarely addressed by Judge Rakoff in

the Ephedra Products litigation in 2005. In Ephedra, Judge Rakoff held that the filing of a proof of claim constitutes in a contested matter triggering the courts discretion at that point to apply Rule 7023 under Rule 9014. Indeed, Judge Rakoff specifically considered the question and found that the claimant had the right to move for class certification from the moment the Chapter 11 petition was filed.

He squarely rejected the view that claimants were supposed to sit on their hands and it could not move into Rule 9014 until the debtor objected to the claim. He reasoned that, and soundly reasoned, that if that were the law it would mean that a debtor could prevent class claims by simply waiting to the end of a matter before asking the bankruptcy court to apply Rule 23. And then objecting on the eve of confirmation, moving to expunge. And at that point saying that applying Rule 23 would unduly delay administration.

Bankruptcy courts -- not just Ephedra, bankruptcy courts in the Southern District have recognized Ephedra as binding on that point.

Judge Gropper in In re Northwest Airlines and Judge Bernstein in In re Musicland. So there is no case that says that that's the law.

THE COURT: Pause, please, Ms. Zambrano, because you probably know and certainly your bankruptcy partners know, that a district judge's decision isn't binding on a bankruptcy

judge.

Was that a shorthand for they thought it was real persuasive or did they actually say that they thought it was binding?

MS. ZAMBRANO: They probably did not use -- let me -- I can quote the exact words, but they --

THE COURT: I mean, obviously --

MS. ZAMBRANO: -- there's not debat --

THE COURT: -- Judge Rakoff is a very respected judge and when he says something, like E.F. Hutton, I listen. But even Jed Rakoff isn't binding on me.

MS. ZAMBRANO: That's correct, Your Honor. I would suggest that the intimation -- actually, the direct assertion by the claimants that there is some up and down or back and forth amongst the judges in this circuit as to whether someone has to wait until an objection has been filed to a claim before they can assert to file a 9014 motion, is just not accurate. There is no such law. The three decisions on this point --

THE COURT: Are all uniform --

MS. ZAMBRANO: that's correct.

THE COURT: -- and, of course, I'm on record in my published decisions as talking about uniformity within the Southern District of New York.

MS. ZAMBRANO: Judge Bernstein had a very early decision in which he sort of wandered around the point, but he

came back in, In re Musicland and agreed with the Ephedra decision and Judge Rakoff's reasoning.

So applying these principles here, as the Court knows, this debtor filed for bankruptcy on June 1st, 2009. On September 16th, 2009, the Court entered the bar date order that established November 39th, 2009 as the bar date. During this entire period of time, despite the plaintiff's -- the claimant's counsel receiving notice of this order and the bar date. They did nothing to assert a clai -- a class claim. They simply filed their class claim along with the other, approximately, 70,000 that the debtor received. Only when the debtors objected to the claim, did the claimant seek to apply Rule 7023.

In this district, I would assert that that's not appropriate under our case law. Whether it's, as you say, binding so far or not, there is no case law that suggests that that's an appropriate behavior for a class claimant who is supposed to be protected the rights of their putative clients.

THE COURT: Pause, please, Ms. Zambrano. The principal authority for saying you can wait is the Eleventh Circuit's decision in Charter?

MS. ZAMBRANO: That's as I understand it, yes, Your Honor.

THE COURT: To what extent have bankruptcy courts in this district followed the Charter approach?

MS. ZAMBRANO: I haven't seen anyone except for that early decision by Judge Bernstein -- and I can get the cite if you'd like. But I don't think that was the most important point in the earlier Judge Bernstein decision.

Mr. Smolinsky would like me to read from In re North -- the passage that I quoted him earlier from In re Northwest Airlines Corp.

THE COURT: That would be Judge Gropper, of course.

MS. ZAMBRANO: Yes. And this is when the courts are wrestling with this issue. He says, "The reasoning of Charter with respect to the procedural issues has been rejected in this circuit." That's where I get the binding. "As stated in the Ephedra case, the Court disagreed with the Charter's view that an objection was necessary to have a contested matter triggering the Court's discretion under Rule 9014." Some other --

THE COURT: Could you read that slower, please, Ms. Zambrano?

MS. ZAMBRANO: Sure. The intro to the quote says as follows, "Moreover, the reasoning of Charter with respect to the procedural issues has been rejected in this district. As stated in the Ephedra case," Ephedra being Rakoff's --

THE COURT: With that being Judge --

MS. ZAMBRANO: Rakoff.

THE COURT: -- Rakoff's decision.

MS. ZAMBRANO: -- "the Court disagreed with the Charter's", the Eleventh Circuit's, "view that an objection was necessary in order to have a contested matter" --

THE COURT: Okay. That's why I asked you to slow down. Where I need help from you is that Judge Gropper's saying he disagrees with Charter or saying that he agrees with Rakoff when Rakoff disagrees with Charter? Who was it who first said he disagreed with Charter?

MS. ZAMBRANO: I believe it was Judge Rakoff in the Ephedra case.

THE COURT: And then Allan Gropper agreed with Judge Rakoff?

MS. ZAMBRANO: As well as Judge Bernstein in the In re Musicland case.

THE COURT: Now I'm with you. Now I'm with you, continue, please.

MS. ZAMBRANO: Okay. Excuse me. "Of course it is the claimants who are supposed to be protecting the rights of these putative class members and who have the burden of timely prosecuting these claims. It cannot be, regardless of this dec -- these decisions, that it's the debtors' objection to a class claim after the bar date gives the claimants more time to proceed as a class. Rather, the claimants here were required to obtain permission to proceed as a class as soon as practicable."

And that language is in all of the Southern District of New York cases regarding these issues. What that means here is that they could have requested permission to proceed as a class as early as the petition and as late as the bar date order -- the bar date, excuse me, on November 30th.

Now, I want to note something specifically here, Your Honor. We -- I have appeared before Your Honor on class action matters and it is important to note that there are class plaintiffs who did recognize their obligation to move under Rule 9014 and approached the debtors. And recognizing this obligation that they needed authority to proceed as a class in these bankruptcy matter, negotiated stipulations with the debtors and Your Honor entered orders --

THE COURT: That was --

MS. ZAMBRANO: -- on those.

THE COURT: -- in the context in which you had appeared before me.

MS. ZAMBRANO: I entered -- I appeared before on a class action claim that had not been certified but was resolv -- was settled and resolved.

THE COURT: I see.

MS. ZAMBRANO: But it was certified before and that being obviously different here.

THE COURT: A pre-petition certification?

MS. ZAMBRANO: Correct.

THE COURT: Well, that makes all the difference in the world. At least in terms of taking an issue off the table, doesn't it?

MS. ZAMBRANO: It does, but it eve -- but it suggests why -- if you aren't certified, why would you expect that you do not have to move under Rule 9014? If you're certified, courts have held that it's more reasonable for people in you class to expect that you are representing them and so there's more forgiveness there.

Here, there was every reason in the world that they should have come to us or filed a motion and asked the Court to permit them to assert a claim on behalf of these claimants. I think I heard one of the claimant's counsel say that there were thousands of people in South Africa who believe they have claims against GM. Well, why didn't they file a proof of claim in this bankruptcy? Why didn't the plaintiff's counsel who has specifically had notice, Ms. Sammons who is here today, of the bar date order indicate to these plaintiffs that they needed to file a proof of claim or otherwise effect notice?

THE COURT: Ms. Zambrano, lower the tone a little. I understand that you're passionate. I'm sure your opponents are passionate, too, but they kept their voices under control. I'd appreciate it if you did likewise.

MS. ZAMBRANO: I will.

Let's focus on the bar date for a moment. What the

claimants are really attempting to do in my view is to extend the bar date which passed, of course, nearly a year ago. Such an extension would violate due process rights of other creditors that Your Honor has referred to today, who timely filed their proofs of claim. And it simply should not be permitted.

And for these reasons, not withstanding the Kiobel decision, we believe that the class proof of claim -- excuse me, the class claimants' claim should be expunged.

MS. ZAMBRANO: Then the second reason that they should be expunged was that even if the Court were to overlook Kiobel and if they were to -- even if you were to allow the untimely request to apply Rule 7023, the Court should not exercise its discretion to apply Rule 7023 here.

In determining whether to permit a class proof of claim, courts consider whether the benefits that generally support class certification in civil litigation are realizable in the bankruptcy matter. Many courts have held that the benefits derived from the use of the class action device are not consistent with the bankruptcy setting. As explained by Judge Bernstein in In re Musicland, bankruptcy provides the same procedural advantages as class actions. In fact, it provides more advantages. To use his words, "Creditors, even corporate creditors, don't have to hire a lawyer and they can participate in the distribution for a price of a stamp. They

need only fill out and return the proof of claim form." Time and again then, courts have emphasized that the discretion to permit a class claim in bankruptcy should be exercised most sparingly and this is setting aside the timely issue.

And so in general, courts have only allowed class claims to proceed in bankruptcy in two situations; one in which the class was certified prepetition by a bankruptcy court -- excuse me, by a non-bankruptcy court and second where there has been no actual or constructive notice to the class members of the bankruptcy case and the bar date.

While courts have consistently noted that classes certified prepetition are the best candidates for class treatment in bankruptcy, some courts have even decided that classes that were certified prior to bankruptcy cannot be certified in the -- cannot be allowed to proceed as a class in bankruptcy.

It is stipulated here by the claimants, of course, that there has been no class certified in either of the putative class complaints attached to their proofs of claim. Indeed, although these cases have been pending since 2000 -- 2002 and 2003, no motion for class certification has ever been filed and no -- importantly, no class certification discovery has ever occurred.

THE COURT: You mean in the plenary actions in the period from 2002-2003 to 2009 when the MLC case was filed?

MS. ZAMBRANO: Correct. Correct.

THE COURT: Do you have knowledge or belief that isn't speculation as to why? That's a long time. Normally -- well again, I'm going back to when I was a litigator and maybe things have changed over the years but normally, class action certification would be considered very early in a plenary litigation.

MS. ZAMBRANO: The rule says, Federal Rule of Civil Procedure 23 says, of course, it should be considered as soon as practicable. I wasn't involved in litigation. I did hear from claimant's counsel today and I have seen on the docket that there were -- had been a number of appeals of the Court's denial -- of the motions to dismiss rulings.

Right before the bankruptcy filing in April of 2009, there was the second motion -- denial of the second motion to dismiss which, of course, was appealed by the non-GM, non-MLC defendants. And that we've referred to that today that's on appeal.

THE COURT: Uh-huh.

MS. ZAMBRANO: The debtors have not found any decision in the Southern District of New York or otherwise in which an uncertified class action has been permitted to proceed in a class -- as a class in the bankruptcy and the claimants have not cited one either. Thus, the claimant's attempt to rely on a very narrow exception for allowing class claims in bankruptcy

complaining of the worldwide notice of the bar date that was provided by the debtors at a cost to the estate of nearly 1.3 million dollars. Effectively what they're asking the Court to do is to declare that the notice provided to the putative class of millions of people in South Africa was not sufficient and certify a class in the bankruptcy so that additional notice can be provided to those same claimants at the expense of the estate.

This must be rejected for three reasons. First, as we talked about in our papers, non-US citizens such as those that we're dealing with here -- there are exceptions but like the ones that we're dealing with here who are not in this country and do not have any property in this country, they are not entitled to due process notice under our constitution. And I'll talk more about that in a moment.

Second, even if due process did apply to the claimants, the constructive notice provided to these claimants was sufficient according to the standards articulated by our Supreme Court in Mullaney.

And third --

THE COURT: Well, pause, Ms. Zambrano. Even John Roberts who normally can be pretty tough on plaintiffs, when he found that there was a practical way to give notice to somebody and that didn't materialize, he found that notice unsatisfactory. I've forgotten the name of the case. Your

opponent, Mr. Olson, argues in substance that if you wanted to give notice to the Black South African community in South Africa, there were a zillion better ways of doing it than using the international edition of The Wall Street Journal or USA Today or whatever that third publication was -- was it The Times?

If you didn't have to give notice because you could rely on class plaintiffs or the fact that they don't have the rights that folks in the U.S. would, that of course moots of all of these concerns, but if I wanted to give notice to that community I wouldn't have chosen those three papers to do it.

MS. ZAMBRANO: Well let me start with the Supreme Court's words. What they said is, "It has been recognized that in the case of persons missing or unknown, employment of an indirect and even a probably futile means of notification is all that the situation permits and creates no constitutional bar to a final decree foreclosing their rights."

Now what I found interesting about --

THE COURT: That's from Mullaney?

MS. ZAMBRANO: That's from Mullaney. What I found interesting about the claimants' complaints about the publication notice was that there -- they admit that there is not a single primary language for the majority of the putative class. They identify seven -- excuse me, eleven South African publications that are purportedly more likely to reach

according to them, the putative class members but even then, none of them are asserted to be sufficient to reach a majority of the class members. Instead they seem to suggest that the only notice that would be adequate for these unknown alleged claimants would be a comprehensive outreach to all Black South Africans and they refer to in their papers, non-governmental intermediaries. That's what they're suggesting would be sufficient. And, Your Honor, in our view under Mullaney, that's not required.

I would also note that to the extent that the claimants counsel believed that the procedures that Your Honor was setting up with respect to the notice were inappropriate or would not satisfy due process with respect to their claimants. They could have been objected and been heard in that process when the debtor was constructing and negotiating with the creditors committee about how much money and how to effect notice to the various claimants around the world.

There are claimants across the world that filed claims against GM. And so really what they're asking you to do is to find that for these particular claimants, the bar date should be extended.

Should I go ahead and go to the Ah Robins case about due process? Maybe that would be --

THE COURT: Sure.

MS. ZAMBRANO: The Fourth Circuit in that case -- and

this is good law, Your Honor. It has not been overturned and there is not any -- when you pull it up on Westlaw there is not a red flag or even a yellow flag. It is good law. And what they found replying on -- relying, excuse me, on Supreme Court precedent, held that foreign claimants are not entitled to due process notice of a bar date.

Now the Ah Robins case, of course, was different in that there was a broader notice provided but what was interesting --

THE COURT: This was on Dalkon Shields?

MS. ZAMBRANO: That's correct. What's interesting about that though, it goes exactly to the point that I just raised, the claimants and counsel in those cases objected to the bar -- or to the notice procedures early on claimed that they were not going to be sufficient. So they required the debtors to go out and revamp their notice procedures, notwithstanding all that, the Court -- its initial holding is that non-foreign or excuse me, foreign -- non-United States citizens are not entitled to due process notice of a bar date.

Now there is a variety of cases that are cited in, I think it's the reply in support of their motion to -- under 7023, that deal with this point and essentially they are all not on point because they are dealing with foreign claimants who have either a property right in the United States or they are non-resident aliens that are here. And of course the

Supreme Court has treated that and Circuit Courts have treated them differently because they do have due process -- there are due process implications when someone comes in our country.

But when you're talking about foreign claimants that are across the world and have no property interests here, the Court ruled squarely, squarely that they are not entitled to due process notice. Now notwithstanding that, of course, we did the publication notice. And as I've described, I believe that it was reasonable in these circumstances. It was published internationally in over ninety countries at a cost of 1.3 million dollars to this very strained estate. More specifically, we published in not just one, but we did publish in three publications that are distributed throughout South Africa.

THE COURT: That being The Times, The Wall Street Journal and USA Today?

MS. ZAMBRANO: That's correct, Your Honor. And of course as I noted earlier, we did specifically direct notice to the plaintiff's counsel, as well.

THE COURT: So what are you trying to give notice to the South African hedge funds?

MS. ZAMBRANO: I believe, Your Honor --

THE COURT: Look, I understand your points about Ah Robins, I understand a lot of other things but if you're trying to give notice to a certain community, are you looking me in

the eye and telling me that that was the way that was calculated to give notice to those people?

MS. ZAMBRANO: I'm looking you in the eye and telling you that this was a very large estate as Your Honor is much close to than I am, and that in these circumstances the debtors with the creditor constituencies spent significant effort in determining what would be an appropriate notice procedure. And under the circumstances, and with the resources that we have, we believe we did the best job that we could. And -- as to all claimants and that's why we think the bar date is sufficient.

THE COURT: Well why don't you try to protect your credibility on your stronger points?

MS. ZAMBRANO: Okay, Your Honor. Let me move to then what would be the harm at this point to permitting, basically effectively to allow these particular claimants to extend the bar date for them and come in. I believe, Your Honor, that at this juncture the Court, you know, of course has just set a hearing, hopefully a final hearing on the approval of the debtors' disclosure statement. The debtors have through great effort negotiated that plan of liquidation with their creditors and hopefully solicitation and confirmation will occur soon.

Noticing and liquidating a class action of the nature and the size that we're talking about here involving at a minimum by plaintiffs' own estimates, tens of thousands, I would submit that it's more like millions of people in --

across the world would seriously delay the distribution of the debtors' estates.

We, of course, did ask in the alternative for Your Honor to help us estimate the claims if you don't outright expunge them. Frankly, we're not even sure how to do that in an expedited way. There are simply too many factual circumstances and short of doing what the claimants' counsel referred to in Hilao which has been specifically criticized in this jurisdiction, she referred to the assumptions regarding liability and assumptions regarding damages. What the Court did was basically put people in buckets: If you were tortured, this is how much you received; if you were raped, this is how much you received. That was specifically rejected by Judge Cote in the Talisman case and for some -- for a lot of good reasons.

But without doing that which we think is not appropriate, how do you do this?

THE COURT: Well Denise Cote wouldn't be using a 502(c) estimation mechanism. She was talking about the underlying claims allowance process or the district court equivalent of that; am I correct?

MS. ZAMBRANO: She was but she was noting in that discussion that the constitutional concerns that that raised for a defendant as to a finding of liability with respect to that plaintiff and that defendant and damages of that plaintiff

and that particular defendant, primarily the liability and the constitutional issue. And so I think it is germane that the Court said that that -- she had great concerns and rejected that type of treatment.

And I do want to note as well that that decision, the Hilao decision out of the Ninth Circuit was before the Supreme Court's decision in Amchem, which radically changed Rule 23's interpretation.

The fourth reason that the claims should be expunged is that even if the Court overlooks Kiobel, even if the Court would permit the filing of a class or a motion to treat -- to allow a class claim at this late point and exercise its discretion to apply Rule 7023, the benefits of Rule 23 could not be realized in this bankruptcy proceeding because the claimants simply cannot satisfy Rule 23. And listening to Your Honor's opening remarks, I'm going to focus specifically on Rule 23(b)(3). We, of course, do not concede Rule 23(a)'s requirements but I'll focus on 23(b)(3).

THE COURT: Which of the 23(a)s do you have a problem with?

MS. ZAMBRANO: I think typicality is particularly difficult here. The plaintiffs have -- the claimants have suggested in their papers quite openly that there are subclasses of GM defendants or GM plaintiffs but respectfully, that's just not the case. There are allegations that would go

to the automobile industry or the -- in some cases there are specific references to GM but I don't think that you can say that a particular plaintiffs' case claims are typical of any other plaintiffs' claims in this case based on the class certification -- based on the fact that we don't have class certification discovery looking at this from the abstract. We don't even know which of the class -- the named class plaintiffs allege any harm by -- against -- by MLC formerly known as GM. So, I don't think that they can say that their claims are typical yet but I will focus on Rule 23(b)(3).

THE COURT: Well I thought you were going to say the mirror image of that. I mean Ms. Sammons read to me two or three paragraphs from the complaint where they talk about GM reporting union activity, picking on one guy in particular and so forth. Now I can see why you would say that that guy's circumstances aren't typical of others but it isn't that they failed to allege GM involvement in certain of the wrongful -- alleged wrongful conduct.

Is it your point, and if so I think I'd understand it, that that guy's experiences which I think most right thinking people would consider pretty awful and pretty offensive, have not been shown to be typical of other people who were treated as badly as he was and/or in the fashion in which he was.

MS. ZAMBRANO: Exactly, Your Honor. Exactly. And again, some of that is without the benefit of class

certification discovery. I don't know which of their named plaintiffs have received that abhorrent kind of treatment versus which ones haven't. I just don't think that we can admit at this stage that their claims are typical. But I would concede --

THE COURT: And that would be a 23(a)(2) issue if I -- well I'd have to go back and see which --

MS. ZAMBRANO: That's correct.

THE COURT: -- of the four subsections is which but that's your point.

MS. ZAMBRANO: Me, too and that's correct.

THE COURT: Okay.

MS. ZAMBRANO: Yes. So 23(b)(3), of course, requires that the Court find that questions of law or fact that are common to the members of the class predominate such that -- excuse me, over any questions affecting only individual members and that a class action be superior to other available methods for the fair and efficient adjudication of the controversy. Focusing on predominance for a second, and of course these requirements are referred to as the predominance and superiority aspects of Rule 23(b)(3), many, many reasons they do not satisfy these requirements.

I want to make clear, however, that -- and I've referred to this a few times, in the event that the Court were allowed -- were inclined to allow these claims to proceed we

would, of course, need class certification discovery to fully address these issues. We are making these arguments based on the allegations alone.

The individualized proofs required to be presented to establish the tens of thousands of claimants are entitled to relief under this statute, the alien tort statute, for actions that took place across the world for over a span of decades to millions of people in a factual -- in a multitude of factual circumstances would quite simply swamp the proof on any common issues of liability.

The plaintiffs claims that GM aided and abetted the South African government's violations of the alien tort statute requiring highly individualized and specific, fact-specific finding, in addition to showing that each plaintiff was a victim of the tort alleged, the plaintiff must demonstrate the elements of an aiding and abetting claim with respect to each plaintiff. These elements were outlined in the Second Circuit's decision in Talisman, Presbyterian Church of Sudan v. Talisman Energy. And we've been referring to Talisman a couple of times today so I want to make clear, this is the Second Circuit's decision in which after Judge Cote denied class certification, the individual named plaintiffs proceeded and the case went to the Second Circuit. And in that case --

THE COURT: Proceeded as a non-class action.

MS. ZAMBRANO: Correct, Your Honor. And in that

decision then the Court was wrestled with what is the appropriate showing that a plaintiff needs to make to establish aiding and abetting liability. And what they found was that they must show that with respect to each plaintiff, that the defendant provided practical assistance to the principal that has a substantial affect on the perpetration of the crime and does so with the purpose of facilitating the commission of that crime.

Indeed, the Second Circuit made clear that there was no basis for imposing liability on individuals who even knowingly but not purposefully aided, abetted -- and aided and abetted a violation of international law. So it's not just that GM, former GM would have had to know about it. They need to prove with respect to each putative claimant that GM -- the former GM purposefully aided and abetted a violation of international law.

So for each class member, they must prove the tort occurred, that GM provided practical assistance that had a substantial affect on the perpetration of that tort and that a GM employee did so with the purpose of facilitating the commission of that crime. So the example that claimants' counsel gave you is just one of the multitude of different factual scenarios that they would be required to prove on behalf of every claimant. And that is why we believe that the proof on the individual issues would swamp any proof required

on common issues.

The plaintiffs are really alleging a mass tort and mass torts involve critical individualized issues including causation and damages. The majority of courts therefore have refused to certify class actions in mass tort cases. Courts in this district and I'm going to refer now back to Judge Cote's decision when considering whether to certify a class in cases alleging claims quite similar to the apartheid claims have refused to do so. In that district court decision in Talisman, current and former residents of Southern Sudan brought suit under the alien tort claims act against a Canadian energy company and the government of Sudan alleging that they were victims basically of the same crimes here; extrajudicial killing, genocide, crimes against humanity, torture, rape and other violations of international law. And that all resulted from the defendants' ethnic cleansing of an area around the oil fields. The plaintiffs' sought certification of a very large class, a putative class of certain non-Muslim African Sudanese citizens who had been injured by the Sudan military or allied malicious war crimes. In particular, areas around those oil fields. The total number of claimants estimated was between 114,000 to 250,000. And the claims involved hundreds of separate attacks.

In Talisman, the Court denied class certification after going through all of the cases that were existing at that

time that claimants' counsel has discussed today and specifically held that the plaintiffs would have to show with respect to each individual class member that the injuries for which they were claiming damages were actually caused by the campaign of genocide and crimes against humanity targeting non-Muslim African Sudanese.

And to do that, factual issues that were individual to each attack, to each instance, would have to be determined. Given the need for evidence of proximate causation, not some sort of a general causation that the Talisman Energy Group was in coordination with -- was working in coordination with the government of Sudan but with proximate cause as to each particular class plaintiff. And the allegations would be -- involve hundreds of thousands of class members, hundreds of individual attacks, massive geographic area and six and a half year time period; the Court found that the challenge of presenting individual proof on behalf of thousands of class members even if it were logically feasible would quickly dominate the proof regarding any common issues.

The parallels between the putative class action in Talisman that Judge Cote grappled with and the putative class in this matter are plain. In both cases you have a proposed class definitions that link membership with the merits of the plaintiffs' claims, that allege liability of the corporate defendant stems from the alleged activities of a sovereign

nation. The putative class period spans many years. The allegations involve hundreds or as we say, probably millions here, of claimants in individual attacks. Each member of the putative class would be required to show that the act that caused the harm he has alleged to have suffered was the product of collaboration, again with purpose by GM, former GM in the apartheid regime.

The impossibility of this task is apparent in the face of a class consisting here of thousands of individuals alleged to be injured in separate instances occurring at different times over several decades and spread across the entire country of South Africa.

Now plaintiffs argue that Talisman is not on point primarily because of the tribal warfare that was going on in that country and that explains the Court's focus on proximate cause but I want to read a brief quote from Talisman that squarely addresses that and rejects it. "In any event, the dilemma of proving proximate causation would exist in this case even in the absence of intertribal warfare that the Talisman trumpets." She said that "The plaintiffs apparently envisioned simply establishing in a general fashion that the campaign existed and will leave for another day the specific proof of attacks pursuant to the campaign that injured individual class members. It is the need for evidence of such linkage for evidence of proximate causation that signals the doom for Rule

23(b)(3) certification, given the only way to proof proximate causation," not damages as the claimants suggest but "proximate causation for claimants is through individual proof. Litigation through representatives will not suffice. The challenge of presenting that individual proof on behalf of thousands of class members even if it were logistically possible or feasible," excuse me, "will quickly dominate the proof regarding the common issues."

And so, Your Honor, I liken this to a situation in securities law which I do a little of where a general fraud claim versus a claim under the Federal Securities Act in which the --

THE COURT: By Federal Securities Act you mean the 33 Act?

MS. ZAMBRANO: Correct. And so -- or the 34 Act for that matter.

THE COURT: Well 34 Act permits fraud on the market cases which are more capable of being handled in a class action than say 12-2 cases face-to-face fraud type cases and so forth.

MS. ZAMBRANO: And that's the analogy I'm drawing. This is not a situation in -- for example, one of the cases that they cited and that was spoken about today was the Doe v. Gap case and that was the Saipan workers. And in that case, a class action was certified because there was -- the proximate causation -- I know it's reliance and securities fraud but the

analogy being there -- that it could be established on a class wide basis that if there were a policy of involuntary servitude, basically you would establish that you worked at that time and then the damages would be your hours. And that could work.

But contrast that in the analogy to a securities fraud case versus a general fraud case where courts have consistently declined to permit class treatment because the reliance issue has such individual ramifications and individual, factual circumstances. And I think that is an appropriate analogy.

There are certainly mass tort cases in which courts have certified class actions but that is the distinction. The distinction is whether there is some class wide issue that can be result. Reliance can be presumed. Causation can be established because of a policy. We cannot establish a policy just of apartheid in this case. It has to be that the particular plaintiffs suffered harm because of the aiding and abetting that MLC, previously GM, participated in and caused damages to these plaintiffs. That's what's required under the Second Circuit precedent in Talisman on aiding and abetting.

Finally, Your Honor, I just want to note that given the -- well two things with respect to where we go next. I have already addressed Your Honor's question regarding whether to wait is sufficient here. Your Honor, we believe that that would not be prudent given that the overhang that this class

claim represents in this bankruptcy, we do need to move on. The Second Circuit decision is on point as much as it could be and we believe that we need -- that the claims should be expunged, not --

THE COURT: Well let me ask you a question on that and I would well understand if you'd want to talk to Mr. Smolinsky about it. I have existing law that says yes, I am bound to dismiss the claim. The Circuit could grant en banc review or it might not. It might do it in the next two weeks before the disclosure statement's finalized or it could do it in 2011 or God knows what else.

502(j) of the Code provides for a court, if a claim has been -- and I'm putting it in context -- disallowed, it may be reconsidered for cause. Would you agree that if the Circuit did vacate the panel decision upon which the claim would be disallowed it would be appropriate for 502(j) reconsideration?

MS. ZAMBRANO: I am going to consult with Mr. Smolinsky.

THE COURT: I would if I were you as well.

(Counsel confer)

THE COURT: Mr. Smolinsky?

MR. SMOLINSKY: Good afternoon, Your Honor. Joe Smolinsky at Weil Gotshal for the debtors.

I have been listening to this entire afternoon of argument and I guess I certainly recognize that 502(j) exists.

I certainly understand that this appeal were the en banc request is out there. The problem that we have is that we can't put a box around this allegation. I haven't heard what the definition of the class is.

According to my Google search, there are 49 million residents of South Africa, seventy-nine percent of those are Black South Africans. Is that the class that we're talking about? Are we talking about forty million potential claimants? Are we talking about tens of thousands?

If we're only talking here about the named claimants, then we could probably put a box around it and we could address Your Honor's concerns if your decision is based solely on whether Kiobel gets affirmed or approved by the en banc panel.

But with this unknown potential class of tens of millions of claimants, it becomes -- the 502(j) is just not practical because by the time that we got through what would be months and months and months of class certification discovery, the most -- most of the distributions in this case hopefully will have been made already.

THE COURT: Thanks. Okay. I'm not sure if you were done or not, Ms. Zambrano.

MS. ZAMBRANO: I have one more brief point and I don't know how well it will be received but I do want to note that in the proposed -- we submitted a second proposed order because in the event that Your Honor was inclined to grant a request to

expunge these claims for the reason that Mr. Smolinsky just noted, we don't want to though on the other hand have to reserve for these claims given the impossible box that we're forced to try to draw around these claims. And so therefore, the proposed order that we submitted specifically indicates that we do not have to reserve for these claims in light of any appeal which we think would be not successful given Kiobel, of course -- our view of Kiobel. And I wanted to bring that to the Court's attention that we did that specifically so that we won't have the claims expunged but then be really in a catch 22 because we would have to deal with any issues on appeal and reserve and that question not be decided. So we specifically clarified that in the proposed order. Thank you for your time, Your Honor.

THE COURT: Thank you. Okay. I'll take reply but obviously it's got to be a lot shorter than what I heard on the first round from each of you.

MR. OLSON: Thank you, Your Honor. Again, Steig Olson from Hausfeld, LLP. I'll try to keep this as brief as I can and pick up on Your Honor's cues about what interests you or not.

On Kiobel, I can set the matter straight for the Court, it's true that the corporate liability issue was raised in our case and briefed. Not only that, significantly we filed, I don't know maybe ten amicus briefs or ten amicus

briefs were filed on our behalf by some of the world's most distinguished legal scholars. So that issue was presented in our appeal.

Now for whatever reason, Judge Cabranes couldn't get another judge in our case to agree with him that there was no corporate liability under the ATS and in fact, you know, no court's ever held that. But Judge Cabranes was also on the Kiobel panel and as MLC didn't dispute, there's not only no briefing, there was no -- none of the amicus briefs were presented to the judges in that panel. They simply had no argument at all on that.

THE COURT: Pause please. When you said Judge Cabranes couldn't get two others to convert, is that sensed -- something you sensed from the oral argument? I didn't understand that there was actually a written decision on yours.

MR. OLSON: Oh, I only say that because there was no ruling in our case. And it would --

THE COURT: And Judge Cabranes was on the panel.

MR. OLSON: Yes.

THE COURT: And were there two other Circuit judges or a visiting judge or a district judge? Who else was on the panel?

MR. OLSON: It was Judge Hall and Judge Livingston, both Circuit judges.

THE COURT: Uh-huh.

MR. OLSON: And this is a bit of conjecture but, of course, the issue was presented in our case. It was briefed. There were the amicus briefs. So it would seem logical to -- if that ruling was going to be reached to have been in our case, as well as opposed to another case that Judge Cabranes also happened to be in where the issue was literally not briefed, where the judges there received no benefits of legal scholarship from amicus briefs. But Judge Cabranes evidently found one judge there who shared his opinion and --

THE COURT: That being Judge Jacobs.

MR. OLSON: Yes, the Chief Judge; yes. And, of course, Judge Leval who strongly dissented. And so I say that because I know Your Honor wants to understand the landscape there but also because I think --

THE COURT: Well on one level I do want to understand the landscape. On the other level, I am not such a lawless beast that I disregard binding authority from the Second Circuit.

MR. OLSON: Well I can't imagine, Your Honor, that any judge would be accused of being a lawless beast by not taking action that would have a prejudicial effect immediately after a decision, while an en banc petition is pending particularly where there can really be no doubt that procedurally there were some oddities that as Your Honor noted raised eyebrows about the decision. I think that was --

THE COURT: Well I don't know all the facts. All I know is that some of the things you said I found a little surprising. I'm not being judgmental in that regard.

MR. OLSON: Oh, absolutely and I understand that, Your Honor. If the Court was interested, we do have a copy of the en banc petition. Unfortunately we only have one. I've highlighted one or two sentences.

THE COURT: Is it a publicly available on the internet on the Circuit's ECF?

MR. OLSON: It should be, yes, Your Honor.

THE COURT: Then give enough for your opponent to find it and hand me up what you've got if you can spare it.

MR. OLSON: Okay. The docket number for this case is 06-4800 and there's another docket number which is 06-4876 and I will hand to your clerk the petition for rehearing and rehearing en banc for plaintiffs' appellants, cross-appellees that's dated October 15, 2010.

THE COURT: Okay.

MR. OLSON: And I do that partly because I know Your Honor just wants to know the facts of that matter and that lays them out. It also addresses the merits, MLC's counsel has addressed the merits and attempted to defend the Kiobel decision. I don't see any reason to really go down that path in the time we have. But I --

THE COURT: Whether the panel got Kiobel right or not,

is not something consistent with my pay grade. Whatever the Circuit said or ultimately says is what is binding on me.

MR. OLSON: I understand. So that -- I won't spend any time on that.

THE COURT: Right.

MR. OLSON: The only thing I would mention is, of course, the panel in our case hasn't ruled and it's -- there are ways that the Kiobel decision could be interpreted and that we could react to, we believe, that would allow our case to move forward. So we don't -- even if the --

THE COURT: You've got to help me on that. I thought Motors Liquidation Company is a corporation.

MR. OLSON: Motors Liquidation Corporation (sic) is a corporation. It also has officers and directors who were involved --

THE COURT: Sure. But I haven't heard them objecting to your going after officers and directors.

MR. OLSON: Well I --

THE COURT: And that doesn't impact upon MLC's creditor community.

MR. OLSON: Well what if -- and again, you know, we haven't explored all of our options here. We've considered some but it seems to us it could be possible that the GM entity and now the MLC entity, could be liable for actions of officers and directors that took place in the capacity as their agents.

THE COURT: Isn't that what any suit against a corporation is about?

MR. OLSON: Well I --

THE COURT: I mean corporations act through their agents. Before Cabranes and Jacobs ruled that you can't go after a corporation, the liability of the corporation would have been based on the actions of its agents.

MR. OLSON: Yes, that's right. And the ruling says that you can't sue the corporation.

THE COURT: Right.

MR. OLSON: But we -- the ruling may mean that you can name the officers and directors and the corporation would indemnify them in some sense.

THE COURT: Do you remember what I told Ms. Zambrano about not blowing your credibility and saving your energy on your stronger points?

MR. OLSON: Okay.

THE COURT: Okay.

MR. OLSON: So I'll move on from Kiobel to timeliness.

THE COURT: Yes.

MR. OLSON: A couple of points here. I'll just review the case laws as we see it briefly because we see it a little differently. There is the Southern District of New York's case from In re Chateaugay Corp.

THE COURT: Chateaugay. It's a very familiar case to

those of us in the bankruptcy community. It involves the LTV Corporation.

MR. OLSON: Okay. And the Court knows as well that the judge there ruled that "Prior to objection, proofs of claims made on behalf of a class must be presumed valid and may be filed as of right." That's at page 634 of the decision. And so that is, of course, supportive of our argument that there's some tension. And the Court also said, "The bankruptcy court must exercise its discretion pursuant to Rule 9014 to apply or not to apply Rule 7023 once an objection has been made to those claims." That was the holding of that court.

Now we move forward to the Ephedra decision which has been discussed and the Ephedra decision traced sort of a dispute but significantly said that "Because of the opacity of the code and rules it would not rest a decision on a procedural default even if it disagreed that claimants in a case like ours had to wait for an objection to be filed." And that's at page 77 of that decision. That was in 2005.

Now in 2007, there's the In re Musicland case. This is after Ephedra and that decision expressly noted that there is some question whether the motion could have been made any sooner, referring to this issue. So as of 2007, after the Ephedra decision, the Musicland court recognized that there was question that remained about this issue and we don't read the Musicland decision and I'll let the Court read it for itself,

as resting its holding in any way on a ruling that claimants must move prior to an objection being filed.

But what this really raises, Your Honor, is probably the more significant point which is that no court, certainly not any of those three, has ever ruled that the mere fact that a claimant did not file until right after an objection was a sufficient procedural default somehow to expunge their claims. There's no -- no court has ever ruled that.

Instead, the standard that has to be applied, that every court has applied, is the standard of legal prejudice as we say in our -- as we showed in our brief. For example, in Ephedra the problem that Judge Rakoff had was that the motion for class treatment only came after the liquidating plan had been submitted to creditors for a vote. Similarly in the In re Woodward & Lothrop Holdings case, class treatment was denied because the class representative only raised the issue after the plan was confirmed and seventy percent of the assets were distributed. In the Thomson McKinnon case, the class representative never filed a motion at all.

So no court has ever reflexively held that a class claim will be barred simply because the claimants waited for an objection to be filed. Now --

THE COURT: The problem I have, Mr. Olson, is that you articulated that so carefully that you carved out of that statement other types of dispositions that would hurt you

almost as badly. Ms. Zambrano stated when it was her turn, that so far as she was aware, I'm not sure if she qualified it that way, I understood it to be that way, no court in this district, no bankruptcy court in this district has ever certified a class that had not been certified as a class prior to the filing of the bankruptcy petition. Do you disagree with her on that?

MR. OLSON: I do not disagree with her on that, Your Honor, but I must add a significant addendum. No court in those circumstances has denied class treatment on that ground. First of all, no court has ever held that that's a dispositive ground on its own. It's a fact that is looked to --

THE COURT: I don't think it is. However, it does tend to inform the discretion of a judge who is concerned about factors such as laches and potential prejudice to the remainder of the creditor community and other things that I think were allowed to take into account in making the discretionary call.

MR. OLSON: Understood, Your Honor. And the point I was going to add is that in all of those cases where courts have previously said that the fact of prepetition certification was significant or its absence was significant, all or a substantial portion of the class received actual notice of the bar date. And we lay out this in our papers. And it's our submission that those two things must go hand in hand.

Now, there's a lot we could say on this. I mean the

prepetition certification issue that some courts have raised is they don't want people swooping in and filing class claims shortly before bankruptcy. And in that circumstance, that should cut against allowing the class claims in bankruptcy. But that's of course not at all what happened here.

Your Honor asked a little bit about the procedural history. We've litigated this case aggressively for eight years, limited -- very limited progress in discovery was made partly because of appeals that have tied us up at various times. We've been up and down to the Second Circuit a couple of times.

That said, we finally came back from the Second Circuit, filed an amended complaint in compliance with the Second Circuit. There were motions to dismiss filed by the defendants before Judge Scheindlin, and she denied them in significant respect, moved the case forward and set an aggressive schedule for discovery. And the parties exchanged disclosures and were -- document requests and were nearly on the eve of filing our or producing the documents that we were supposed to produce in the case when there was a stay in the Second Circuit.

Now GM's bankruptcy occurred sometime before then but although there has not -- although GM did not produce any documents, GM and the plaintiffs went through the process of the document requests, the objections, document collection and

so we anticipate that GM has available to it documents that would be responsive to the certification discovery that was served in the case.

But getting back to the prepetition certification issue, and how it relates to notice, in a case where there has not been notice, actual or constructive, to claimants, no court that we're aware of and we don't believe MLC has cited any, has held that the absence of prepetition certification is even one ground to deny class treatment.

And we believe, Your Honor, that the notice issue is just one that has to be dealt with here. It raises constitutional and due process concerns and there must be some method to address it, whether the Court permits class treatment or invites or allows a very short timeframe for class members in South Africa to actually submit individual claims.

To address the notice issues raised by MLC very briefly, there is the claim that foreign claimants do not have due process rights. The point we'd make there, we make in our papers. That rests entirely on one decision from the Fourth Circuit and counsel for MLC said you go to Westlaw and you check that case and there's no red flags. And the reason for that, Your Honor, is because no court has ever relied on that holding in the twenty-five years since it was issued. No court has ever relied on Ah Robins or cited it for the proposition that foreign claimants don't have due process rights.

And we cited on page 6 of our reply, a variety of cases that point in the other direction and we think that it would be a mistake for this court respectfully to hold that foreign claimants do not have any due process rights.

And given that, there's a problem that we don't think MLC can just walk away from which is that no one reasonable could defend the notice here as one reasonably calculated to give notice to the actual claimants involved in this case.

Counsel here today indicates some confusion about who's in the case. They say they have no idea who's in the case. They say there maybe millions. I won't get into that in great detail but GM's lawyers have been litigating this case for eight years and these have been issues that have been addressed. The scope of the class has been an issue that's been addressed many times throughout the case. They knew who these people were. They knew where they lived. They knew that most of these people are in their eighties and nineties. They're very old at this time. They're elderly. They have great egregious needs. And if they had thought about these people, they could have provided notice for them. The argument that I hear from MLC is somehow what we're suggesting should have taken place is outrageous and it would have involved some comprehensive outreach program that would just have been overly burdensome but it's just simply not true.

At page 8 of our reply, we pointed out that MLC could

have chosen publication in South Africa's most widely circulated national newspaper that's read by people of different social classes, that's not just targeted at the affluent business elite, The Sunday Times. We even told how much it would have cost to put in a very large ad in that paper and it would have been ten thousand dollars.

GM still has a plant over in an area of South Africa and some of the claims in this case arise from issues that happened around that plant and GM knew that. And the cost of publication in that paper would have cost a thousand dollars.

Now if GM had done that, we wouldn't have stood up here today and said that notice was ineffective. We recognize that publication notice as the Supreme Court said in Mullaney, sometimes is fine. In fact, often it's fine, you know? I'm a class action lawyer. We have class action settlements. We have to deal with notice. We recognize it's not always a perfect process and sometimes there's a little bit of legal fiction involved. But if GM had published in South Africa's most widely read newspaper, and maybe addition -- you know, additional thousand dollars in this place where they knew claimants lived, we would have had no argument. But they didn't do that. And in light of that, there's just a notice problem that only we believe class treatment or some other mechanism like an additional short window should provide.

Now getting back to the timeliness issue as it relates

to this, I just have to make this point quickly, we don't -- we're concerned about these arguments that our actions caused prejudice in this case because although we're only here today, we do have to note that we filed our motion for class treatment back on June 22. That was well before MLC proposed a distribution plan and there's no legal prejudice. They were aware when they developed the plan of our class claims. They were aware of those claims since we filed them. Our motion was filed prior to the plan being developed. In fact, they had argued to this -- moved to this court for estimation in the alternative before they developed their plan.

When they developed their plan, our actions in the motion we had filed permitted them to take our class claims into account when they developed it. We -- even if the Court were to say, you know, I review SDNY cases and I think these guys should have known that they didn't have to wait for an objection, that still doesn't indicate that there is, in fact, no prejudice by our actions here. We moved promptly as soon as there was an objection.

The only things I'll say on the Rule 23, Your Honor, very briefly is typicality shouldn't be no -- a barrier here. That typicality doesn't require everyone's the same, doesn't require them to have the same circumstances or the fact pattern be exactly the same. It just means that their claims are the same. And the important thing to recognize here and this

goes to the Rule 23(b)(3) issues is that the claims here as recognized by Judge Scheindlin involve GM's aiding and abetting of the crime of apartheid. That's a claim that she specifically sustained. And in that sense, this is a unique case for the reasons my colleague and I have said and it's different than the Talisman case.

So the focus here is not going to be on specific actions that GM took to specific people. Those are examples of what will be proven. The question here is did GM aid and abet apartheid as a crime and did it do so with the right mens rea? That is, did it aid and abet the crime of apartheid intentionally? We don't -- you know, that's going to be the core question in the case and that question we believe is entirely susceptible to class treatment.

The final thing I'd say, Your Honor, is the Court has referred to the dilutive effect of entertaining these claims. The only thing I would say on this and I know the Court has a lot to weigh, is we believe the notice issue is significant there as well because as I indicated, this class and we visited them in their modest homes, in many cases consists of elderly people who have carried with them injuries now for twenty, thirty years from the apartheid regime. They are humble people. They suffered genuine injuries. They are not seeking millions of dollars. They are seeking money finally from some of the multi-national corporations that allowed these injuries

to occur and cause these injuries to occur. Multinational corporations have never stepped up. But in this case, if those people had been given an opportunity to file claims or if they were now given one, the Court would not see millions of claims. It would see the people who genuinely need assistance and redress filing claims. These are humble people. They're not going to, in our view, fundamentally tax in any way the estate but they are genuine creditors who are worthy of the Court's consideration. And that's all I have unless the Court has any questions.

THE COURT: All right. No, I don't. I'm not going to be in a position to decide this off the bench and I'm not going to be in a position to decide it tomorrow and I don't know when it will be forthcoming. I will take it under advisement and I will get back to you as soon as I can. We're adjourned.

(Whereupon these proceedings were concluded at 4:21 p.m.)

I N D E X

R U L I N G S

R U L I N G S (cont'd.)

| DESCRIPTION | PAGE | LINE |
|---|---|---|
| Debtors' (i) Objection to Proof of Claims Nos. 1206, 7587 and 10162 and, in the Alternative, (ii) Motion to estimate Proofs of Claim Nos. 1206, 7587 and 10162 - decision reserved. | 161 | 14 |

C E R T I F I C A T I O N

I, Clara Rubin, certify that the foregoing transcript is a true and accurate record of the proceedings.

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